THE MADRAS LAW JOURNAL

A NOTE ON S. SAMA IYER AND OTHERS v. O. K. K. APPACHI GOUNDER, (1976) 1 M.L.J. 382.

By

B. SUNDARAMOORTHY, B.COM., B.L., *Advocate, Chidambaram.*

In this case the plaintiff claimed title under a sale deed, dated 16th December, 1966 executed by the Court in execution of a specific performance decree passed in O.S. No. 93 of 1961 against the estate of one Srinivasa Iyer.

The defendant claimed title under a Court auction held on 4th March, 1965 and confirmed on 8th July, 1965 in execution of a simple money decree in O.S. No. 72 of 1961 against the same estate of Srinivasa Iyer.

Sethuraman, J., held that the title of the defendant will prevail as against the title of the plaintiff on the ground that the plaintiff, in a suit for specific performance of an agreement to sell, will get his title to the suit properties only from the date of execution of the sale-deed by the Court in execution of the decree for specific performance and if, prior to that date, the defendant's (Srinivasa Iyer) property has been sold in execution of any other simple money decree, the defendant himself will not have title on the date of execution of the sale-deed by the Court and so the Court also cannot pass title to the plaintiff under the sale-deed.

I submit that this proposition of law requires reconsideration.

It is unfortunate that the attention of the learned Judge was not drawn to the fundamental principle of *lis pendens* (section 52, Transfer of Property Act) in order to uphold the title of the plaintiff and to the fact that on the execution of the sale-deed by the Court the title will relate back to the date of execution of the agreement itself. The suit in O.S. No. 93 of 1961 was a suit for specific performance of an agreement to sell, dated 1958 executed by the defendant (Srinivasa Iyer and another) in favour of the plaintiff and so the doctrine of *lis pendens* directly applied to the case, with the result, that any transfer of the suit property by the defendant during the pendency of the suit would not affect the right of the plaintiff under the decree in O.S. No. 93 of 1961. The sale-deed executed by the Court on 16th December, 1966 was only in execution of the decree in O.S. No. 93 of 1961 and so the title of the plaintiff was derived only under the decree and so the Court auction sale of the same property during the pendency of O.S. No. 93 of 1961 in execution of the simple money decree against the same defendant would also be hit by *lis pendens*.

Therefore the defendant in the suit (Court auction purchaser in O.S. No. 72 of 1961) cannot claim title to the suit property as against the title claimed by the decree-holder in O.S. No. 93 of 1961 in spite of the fact that his Court sale was prior in point of time to the sale deed in favour of the plaintiff. Once a sale-deed is executed in execution of a decree for specific performance of an agreement to sell, the title will relate back to the date of the agreement itself. Now it is abundantly clear that the principle of *lis pendens* applies even to Court sales by reason of the judgments of the Supreme Court reported in *Kedarnath*

Lal v. *Sheondrain*,[1] and *Samarendra Nath Sinha* v. *Krishna Kumar Nag*.[2]

If the above principle is not accepted in all the suits for specific performance of an agreement to sell, the defendant can execute the sale-deed in favour of third parties during the pendency of the suit (or even after passing of the decree and before the execution of sale-deed by the Court) and thereby defeat the title of the successful plaintiff. Further, it is observed in the judgment: "The question is whether the rights of the plaintiffs started from the passing of the decree or from the exection of the sale-deed." My submission is that both these questions are wrong because the rights of the plaintiff start from the date of execution of the agreement itself subject to the liability of being defeated by the subsequent sale in favour of a *bona fide* purchaser for value without notice of the agreement or by the failure of the plaintiff to file a suit for specific performance within the period of limitation. Section 54, Transfer of Property Act also has been carefully worded as follows: "It (contract for sale) does not, *of itself*, create any interest in or charge on such property."

Once the suit is filed for specific performance, the right of the plaintiff becomes unquestionable from the date of suit and the title of the plaintiff will relate back to the date of agreement if the suit is decreed and a sale-deed is executed by the Court. That is why, if a sale-deed is executed in favour of a third party by a judgment-debtor even after the attachment, but in pursuance of an agreement to sell entered into prior to the date of attachment, it is not hit by section 64, Civil Procedure Code and the sale will prevail against the claim arising under the attachment.[3] For the same reason, a subsequent purchaser with notice of the agreement will also be required to join in the execution of a sale-deed in a suit for specific performance.[4] In all these cases, the principle is once a sale-deed is executed in execution of a specific performance decree, the title will relate back to the date of the agreement itself. (*See* illustration in page 260 of Mullah's Transfer of Property Act, 5th edition).

Further, in order to hold that the suit in O.S. No. 93 of 1961 is collusive, the only fact which satisfied the learned Judge was that the defendants thereof remained *ex parte*. The decision of Ismail, J., in *Varadhammal* v. *Ambalal J. Vyas*,[5] does not seem to have been brought to the notice of the Judge to the effect that in order to make a suit collusive, it is necessary to prove that the claim made is fictitious and it is immaterial whether the defendant remained *ex parte* or not because we should not expect a party to contest a claim when "he did not have any defence to that claim in law."

Therefore my submission is that this decision requires reconsideration.

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1. (1970) 2 S.C.R. 204: A.I.R. 1970 S.C. 1717.
2. (1967) 2 S.C.R. 18: (1968) 1 S.C.J. 68: A.I.R. 1967 S.C. 1440.
3. *P. Veeraraghavayya* v. *Kamalu Devi*, (1935) 68 M.L.J. 67: 157 I.C. 1104: 41 L.W. 739: A.I.R. 1935 Mad. 193.
4. *Ramchandra* v. *Chuni Lal*, (1971) 2 S.C.J. 619: (1971) 2 S.C.R. 573: A.I.R. 1971 S.C. 1238.
5. (1971) 1 M.L.J. 65: 84 L.W. 45: A.I.R. 1971 Mad. 371.

itself about this reconversion from a deemed public company into a private company once again after ceasing to be a public company. That is sub-section (4), which reads: "a private company which has become a public company by virtue of this section *shall continue to be a public company until it has with the approval of the Central Government and in accordance with the provisions of this Act, again become a private company.*" There is thus no omission to provide for the reconversion, and the further argument about a case of *casus omissus*, a case unprovided for, does not arise. The argument that, because the case of reconversion is unprovided for, the case of companies *X*, *Y* and *Z* will fall outside the purview of section 43-A and therefore *X* again becomes, or continues automatically as, a private company cannot be correct. According to sub-section (4) of section 43-A, even assuming that *X* has, or wants, to reconvert itself into a private company, the procedure prescribed in section 21 of the Act for 'change of name by a company' should be followed and the approval of the Central Government, if necessary, has to be obtained therefor. But it seems that there is nothing in section 43-A (4) compelling the company *X* to apply for the change of its name even if it has ceased to be a public company and become a private company again. It will continue to be a deemed public company after 1st January, 1974 *until* it chooses to apply under section 21 of the Act. If it does not choose to do, so no one can compel it to change its name again. That may be a lacuna but *X* cannot automatically for any reason get back the status of a private company.

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in another shareholding company". That cannot also bring out the meaning intended. The "shareholding company" *B* and/or *C* has been defined with reference to its holding in the main private company (*A*); companies *D*, *E* may not be holding shares directly in *A* and they cannot be called "shareholding companies."

Be that as it may, whether you say "any shareholding company is itself a shareholder of another shareholding company," or "any body corporate holds any shares in a shareholding company", it makes no difference in the facts or alters the legal position. In the definition of "shareholding company" in clause (*b*) (i) itself, it is stated that the shareholding company should be a "body corporate" first, or as a pre-condition before it can thereafter be referred to as a "shareholding company". The body corporate *C* holds shares in *B*, which is a shareholding company of *A* and that is sufficient that the condition in clause 6 (*b*) (ii) is not satisfied. Therefore, even if condition 6 (*b*) (iii) is satisfied, *i.e.*, total membership of all the three private companies *A*, *B* and *C* do not exceed fifty, the exemption under sub-section (6) (*b*) (ii) of section 43-A will not be available to *A* if this last condition is also not satisfied.

Case 2 :

"*X* is a private limited company. On 1st January, 1970, *Y* Private Limited became a shareholder in *X*, by holding 30 per cent of its paid-up share capital. On 1st January, 1974, *Z* Private Limited, became a shareholder in *Y*. The total number of members in all the three companies does not exceed 50".

Here too *X* cannot continue to be a private company, as concluded by the author. The statement that "*X* continued to be a private company for 4 years from 1st January, 1970; by happening of an event after 4 years it became a public company *with retrospective effect*" is incorrect on two points. How could company *X* have continued as a private company for 4 years from 1st January, 1970 to 1st January, 1974? The moment company *Y* invested upto 30 per cent in the paid-up capital of company *X*, the latter (*X*) became automatically a deemed public company under sub-section (1) on and from 1st January, 1970. If *X* did not take steps immediately under sub-section (2) of section 43-A it would have violated the law. It is immaterial that company *Z* invested in *Y* on 1st January, 1974, when company *X* had remained a deemed public company for 4 years. Sub-section (1) no longer applied to company *X* on and from 1st January, 1970. There is no question of any retrospective effect. It is not correct to say that *Y* became a deemed public company only after the happening of the event of company *Z* becoming a shareholder in company *Y* on 1st January, 1974. No question arises in this case as in Case 1 to have any argument as has been advanced on sub-clauses (*ii*) of clause (*b*) of sub-section (6) that no body corporate, (or "shareholding company") shall be a holder of any share in any other shareholding company. It is therefore not correct to say that "the provisions of sub-clause (*b*) of sub-section (6) were complied with till 31st December, 1973 and till that time *X* continued to be a private limited company." We have seen that it became a deemed public company on 1st January, 1970 when *Y* held 30 per cent of the shares in *X*. The exemption in sub-section (6) did not cease to apply to *X* only after *Z* began to hold shares in *Y*, but it ceased as early as 1st January, 1970.

The author states "there is no provision in the Act stating that such private companies become public companies from the date on which they ceased to enjoy the exemption under section 43-A (6)." There is indeed a provision in section 43-A

SECTION 43-A COMPANIES

By

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This has reference to the article entitled "Section 43-A Companies—A case study" by Mr. T.R. Varahan, published in the Journal section of (1976) 1 M.L.J. pages 30-32.

Case 1:

I should think that the conclusion drawn by the author as regards Case 1 is erroneous. Company *A* cannot continue as a private limited company for the following reasons: The facts of the case are —"*A* is a private limited company. *B* and *C* are two other private limited companies holding more than 25 per cent of the paid-up capital of *A*. Besides, *C* also holds shares in *B*. Total number of members in all the three private companies together does not exceed fifty." The author has failed to appreciate that sub-clause (*b*) of sub-section (6) which provides for the exemption from becoming a deemed public company categorically states that *each of the three conditions* (i), (ii) and (iii) of that sub-clause should be satisfied before the exemption can be claimed. *B* and *C* are specially styled as "share holding companies" for purposes of distinguishing those private companies from the other private company *A* in which both have invested. It is not clear whether each of the bodies corporate *B* and *C* have invested for more than 25 per cent of the paid-up capital of *A*, or both together have invested in that manner. It does not matter, because according to to sub-section (1) of section 43-A, whether they have invested severally or jointly for more than 25 per cent, *A* will be deemed to have become a public company on and from the date on which the aforesaid percentage is first held by such body or bodies corporate *viz.*, *B* and/or *C*.

The fallacy in the argument of the author is that because the investing bodies corporate are to be "*hereafter* in that section *referred to* as 'shareholding companies'," in sub-clause (*b*) (i) the general term "body corporate" occurring under sub-clause (*b*) (ii) or anywhere thereafter cannot any more be applicable to *B* and *C*. This argument is not convincing. The term "shareholding company" has been used only for purposes of being referred to *i.e.*, identification or distinguishing, as already stated, and clearly not to give any legal meaning or significance, as distinct from the term "body corporate". The term "body corporate" is defined for all purposes of the Companies Act in section 2 (7) of the Act. Because *B* and *C* may thus be referred to as "shareholding companies" for purposes of section 43-A, they do not legally cease to be "bodies corporate". That legal status cannot be taken away by adopting for special purposes or temporarily any other terminology to identify them. *B* is still a "body corporate", and ever a body corporate, which holds shares in *A*; likewise *C* is also another body corporate holding shares in *A*, by whatever name they may be called or referred to. Clause (*b*) (ii) of sub-section (6) has to be in general terms. Besides *C*, there may be other bodies corporate (private companies *D*, *E*, etc.) which may also hold shares in *B* or also in *A*. Or bodies corporate *D* and *E* may hold shares in *C*. Or, *E* may be holding shares in *D*, and *D* in *C*, and *C* in *B* and so on. Or, *D* and/or *E* may be public companies (also bodies corporate). How can this complicated combination be described except by saying, as has been done in clause (*b*) (ii), *viz.*, "that no body corporate is the holder of any shares in such shareholding company"? It cannot be described, for example thus: "one shareholding company cannot hold shares

Court so that the administrative plea of geographical and statistical justification for establishment of such Tribunals to as near the people as possible may not stand in the way. While this approach may focus the attention of all concerned as having the basis of national integration, the inherent advantage arising therefrom will be surely appreciated by society as a right step towards social reform.

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in the scope of delegated legislation especially when the Company Law Board is a subordinate authority of the Central Government and such power is not vested with the Central Government under the Act. Notwithstanding such exercise of delegated powers, the enforcement of costs in a civil Court contemplates wide discretion to decide any question or issue relating to the execution, discharge and satisfaction of decree for costs. This would necessarily indicate that the civil Court executing a decree for costs awarded by the Company Law Board, can go behind such decree itself to enquire the dispute as to the validity, basis or justification etc. Here is an example where the basic principles of the Civil Procedure Code may be deviated from because the so-called decree for costs by the Company Law Board is not equated to a decree for money by a civil Court. While a civil Court can entertain applications for amendment of plaint or pleadings at any stage of the suit or proceeding no such provision exists in the Act or the Company Law Board (Bench) Rules and Rule 43 is confined to the power of the Company Law Board to amend any defect or error in the proceedings before it. The term "proceeding" is not defined in the Act or Rules and it has to be understood with reference to its general meaning as a collective usage referring to an enquiry before any particular body or authority.

From these discussions it will not be incorrect to conclude that the Company Law Board is a statutory body created by the Central Government as a subordinate authority to function under the supervision and control of the Central Government as contemplated under section 10-E (6) of the Act. If so, can it not be stated and affirmed that the Central Government itself can exercise all such powers which are delegated to the Company Law Board from time to time? Certainly it can, because the Central Government is not divested of those powers even after delegation to the Company Law Board in respect of such matters under the Act. Suffice it to say, that the Central Government may pass such orders as it thinks fit on the application of any company or person who is aggrieved by the findings or orders of the Company Law Board. To be brief, in exercise of the supervisory powers under section 10-E (6) of the Act, the Central Government may be free to issue executive directions and instructions from time to time as to the nature and scope of the functions of the Board and its members. Whatever be the guidelines or nature of instructions that may be the source for the Board, how far an independent enquiry or approach will be bestowed towards each case coming up before the Board is a matter of serious interest to the corporate management and others concerned. The framers of company law having thought fit to allow "Courts" to exercise the various powers mentioned in serial Nos. 1 to 6 above from the year 1913 and thereafter from 1956 upto 1974 it will be of real interest to all persons connected with the corporate sector that there is a drastic usurpation of the "judicial wing" from the arena brings with it an independent statutory body which is at least devoid of executive bias of comparatively high order.

To conclude, modern thinking towards progressive use of independent Tribunals for speedy dispensation of judicial and quasi-judicial remedies under different statutes may be well considered by the Government so that the former Companies Tribunal is revived with suitable modification to meet special circumstances of the Department in different regions. There is no reason why common Central Tribunals could not be constituted to exercise judicial and quasi-judicial functions under Taxation Law, Excise Act, Companies Act and other Central Economic Acts, as a paralell body like a judicial

The rules of procedure to be adopted by the Company Law Board for discharging its functions are self-contained and laid down under the Company Law Board (Bench) Rules, 1975. The said rules provide for the procedure to be observed for filing applications and petitions, service of notice, opportunity of hearing through authorised representatives, for passing interim and final orders and other matters incidental to the effective functioning of the Company Law Board under the Act. Though it would appear on a surface level that the proceeding before the Company Law Board is of a judicial nature, there are some material aspects which would throw light to show that the Company Law Board is not a judicial authority or for that matter, that a proceeding before the Company Law Board is of judicial nature in the strict sense. Like the many distinct features of a judicial authority, the Act or the Rules do not provide for a right of appeal against the orders of the Company Law Board to any appellate Authority or a Court of superior status. On the other hand, the special powers of the Company Law Board to accord, give or grant approval, sanction, consent, confirmation, direction and exemption can, and may be exercised on such conditions, limitations or restrictions as the Board may think fit. As a step beyond, the Company Law Board is also seized with jurisdiction to rescind or withdraw such approval, sanction, consent, confirmation etc., in case of contravention of the conditions or restrictions imposed originally. In short, the powers of the Company Law Board under section 637-A of the Act are too wide and diversified to authorise the Board to declare nullity of its own order under different times and circumstances which could not be found in any standard form of judicial authority. These are undoubtedly beyond the scope of the ordinary powers of a civil Court to review its own orders. A close scrutiny of the powers of the Company Law Board may surely indicate situations where there is no finality of adjudication of matters which come up before it from time to time. Neither the Act nor the Rules provide that the findings or orders of the Company Law Board are final and there is nothing in the Act to oust the jurisdiction of a Court to adjudicate on matters where a company or other person is not satisfied with the findings of the Company Law Board. To state briefly, the doctrine of *res judicata* with its liberal and extended application cannot be invoked in a separate proceeding in a Court of law though the subject-matter in dispute is the same between the parties. Thus a company or other person against whom a finding is passed by the Company Law Board under section 2 (18-A) of the Act declaring them as a "group" is not barred from seeking proper relief in a Court of law by way of independent remedy. But it is not free from doubt as to whether on such matters any person or company can straightaway approach a civil Court without at first applying to the Company Law Board which is a competent authority prescribed under a special statute.

Another important provision of law which aims to confer wide powers and authority on the Company Law Board to exercise inherent powers like that of a superior civil Court, by itself does not appear to elevate the status of the Company Law Board into one of judicial authority in the strict sense of the term. On the other hand, rule 41 of the Company Law Board (Bench) Rules itself may not be sustained in view of the fact that it is beyond the scope of delegated legislation for the simple reason that such inherent powers do not exist with the Central Government under the parent Act of 1956. Similarly, rule 32 of the Company Law Board (Bench) Rules conferring powers to award costs does not appear to be with-

COMPANY LAW BOARD—AFTER THE COMPANIES AMENDMENT ACT, 1974

By

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A significant change effected under the Companies (Amendment) Act, 1974 seeks to enlarge the area of control and operation by the Company Law Board, a statutory body whose birth and existence is sustained within the limit of the parent Act of 1956. The purpose of achieving speedy results in regard to certain matters on the administration and management of a corporate body, is certainly a desirable and welcome feature in the amended Act in so far as such matters can be reasonably dealt with by an executive body instead of a judicial authority. To this extent, the judicial wing of the State can be said to be relieved of its valuable time and energy which can be increasingly utilised for lessening its burden of mounting arrears of litigation. Thus the object and reality of transferring the jurisdiction of the Court on some matters under the Companies Act, 1956, to a statutory body like the Company Law Board is indeed laudable as a right step towards social reform to which the Government is committed.

In this background it is necessary to note that the functions of the Company Law Board after the Amendment Act is far wider than before. Under section 10-E of the Companies Act, the Company Law Board was empowered to exercise and discharge such powers and functions which have been conferred on the Central Government like grant of approvals for remuneration to managerial personnel etc., by separate notifications from time to time. But, after the Amendment Act, 1974, the Company Law Board is empowered to exercise jurisdiction in respect of the following matters which were hitherto vested with 'Courts'.

1. To confirm alteration of memorandum (section 17).

2. To extend time for filing documents or registration of the alteration of memorandum (section 18).

3. To revive order on failure to register alteration of memorandum (section 19).

4. To sanction issue of shares at a discount (section 79).

5. To order rectification of register of charges.

6. To order meeting to be called.

7. To decide the term 'group' in relation to particular facts and circumstances, section 2 (18-A).

To exercise the above powers and jurisdiction, the Company Law Board is clothed with the powers of a civil Court in respect of the following matters: [Sections 10-E (4-C) (4-D).]

1. Discovery and inspection of documents or other material objects producible as evidence;

2. Enforcing the attendance of witnesses and requiring the deposit of their expenses.

3. Compelling the production of documents or other material objects producible as evidence and impounding the same;

4. Examining witnesses on oath;

5. Granting adjournments;

6. Reception of evidence on affidavits and

7. Every Bench shall be deemed to be a civil Court for the purposes of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898 and every proceeding before the Bench shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code and for the purpose of section 196 of that Code.

A NOTE ON C. SOMAYYA v. E. V. CHINNIAH KONAR, (1976) 1 M.L.J. 336.

By

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Section 11 of the Negotiable Instruments Act has been interpreted by Justice S. Mohan in *C. Somayya* v. *E. V. Chinniah Konar*,[1] holding that a pronote satisfies the requirements of an "inland instrument" if the parties to the instrument are residents of India irrespective of the fact whether the instrument is made or drawn outside India.

A brief resume of facts will bring the law nearer home. A pronote affixing Indian stamps was executed by an Indian citizen in favour of another Indian citizen at Singapore; the parties to the instrument being temporary residents of that place. The pronote was assigned in favour of another Indian citizen who has figured as plaintiff in the case. The suit was decreed by the lower Courts and the question whether the pronote is an inland instrument or not was one of the questions involved over which an appeal was preferred to the High Court.

The interpretation clearly cuts across the express provisions of the section. Section 11 of the Act reads as follows: "A promissory note, bill of exchange or a cheque drawn or made in India, and made payable or drawn upon any person resident in India, shall be deemed to be an inland instrument." To satisfy the requirement of an inland instrument two cumulative conditions have to complied with, namely, the instrument should be drawn or made in India and secondly the instrument should be payable in India or drawn upon any person resident in India. The case on hand satisfied the latter requirement, namely, the place where the contract was sought to be solved and not the earlier requirement, where the contract was enacted. The pronote no doubt satisfied the requirements of the Stamp Act since it had been engrossed on Indian stamps and the question of validation of the instrument did not arise; but at the same time to label the pronote as inland instrument is one step ahead of the statutory requirement. Section 11 of the Negotiable Instruments Act is based on the model of section 4 of the Bills of Exchange Act of England; and the English decisions also compel the satisfaction of both the requirements stated above, though the Act permits an inland instrument's circulation and indorsement in a foreign country[2]. The judgment of Justice Mohan seems to have crossed the statutory bounds in its anxiety to arrive at an equitable conclusion.

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1. (1976) 1 M.L.J. 336.

2. *Hirchfield* v. *Smith*, L.R. (1865) 1 C.P. 340.

A COMMENT ON SIVAN PILLAI v. ANBAYYAN AND OTHERS, (1976) 1 M.L.J. 385.

By

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Justice M.M. Ismail came to the conclusion that failure to apply for the final decree within the stipulated time after passing the preliminary decree in mortgage suits, does not terminate the suit but only produces the anomalous situation of there being a fruitless preliminary decree and the suit itself is pending permanently. It is stated at page 389: "In a suit on a mortgage, after the passing of the preliminary decree, if the decree-holder-plaintiff does not apply for the passing of the final decree within the period prescribed by Article 181 of the old Limitation Act and on that ground the said application is dismissed as barred by limitation, what happens to the pending suit itself does not appear to have been considered so far. I gave an opportunity to draw my attention to any decision, which has considered this aspect of the matter; but the learned counsel on both sides represented to me that they were not able to come across any decision which has considered this question."

There is a ruling of our High Court reported in *Ramunni* v. *Brahma Dattan*[1], which does not seem to have been brought to the kind notice of His Lordship. Similar question arose for consideration in that ruling also. According to that ruling the preliminary decree will not operate as *res judicata* and another suit can be filed on the mortgage deed. Therefore, it would seem that the mortgage suit where a preliminary decree was passed, cannot always be deemed as pending and the mortgagee is not without any remedy if he fails to apply for a final decree within the stipulated time. He can file another suit on the mortgage deed if it is not time-barred.

1. (1892) I.L.R. 15 Mad. 366 (D.B.).

COMMENT *Re*: NOTE ON S. SAMA IYER AND OTHERS v. O. K. K. APPACHI GOUNDER, (1976) 1 M.L.J. 382

By

S. GOVINDARAJAN, B.SC., B.L. *Advocate and Government Pleader, Chidambaram.*

The view expressed in the article at (1976) 2 M L J., (Journal) page 1, that "when once the suit for specific performance is filed, the right of the plaintiff becomes unquestionable from the date of suit and the title of the plaintiff will relate back to the date of agreement if the suit is decreed and a sale deed is executed by the Court" is not correct.

When an agreement is executed by '*B*' in favour of '*A*' then as per the agreement '*A*' gets only the right to have a sale deed executed by '*B*' or in other words, a right to enforce the document.

If '*B*' executes the sale deed, the title flows from the date of sale. If *B* does not execute the sale and *A* is driven to a suit for specific performance, the only right *A* gets under the decree is to have a sale deed executed in his favour by *B* or by the Court on behalf of *B*, in which case, *A* gets title to the property only from the date of execution of the sale deed in his favour in pursuance of the decree. This is a well-settled proposition of law.

There can be no quarrel with the other propositions of law set out in the article about *bona fide* purchasers for value and about "*lis pendens*"

In the case in question *S Sama Iyer* v. *O.K.K. Appachi Gounder*[1], it has been found on a question of fact that the sale in pursuance of the specific performance decree was fraudulent and collusive. So the question of *lis pendens* will not arise for consideration at all.

It is therefore too broad a proposition and an incorrect statement of law to state that title will relate back to the date of agreement when once the sale deed is executed in pursuance of a specific performance decree.

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1. (1976) 1 M.L.J. 382.

A NOTE ON (1976) 2 M.L.J. (N.R.C.) PAGE 9

By

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Under section 20 (1) of the Madras Chit Funds Act (XXIV of 1961) an obligation is cast on the foreman of a chit, to give notice to the non-prized defaulting subscriber about his removal from the list of subscribers, in accordance with the terms of the chit agreement. The foreman shall also enter the removal in the relevant book as per section 20 (2) and shall file a true copy of the removal book entry with the Registrar within 14 days from the date of such removal. Justice Natarajan in Crl. Appeal No. 362 of 1974, reported in (1976) 2 M.L.J. (N.R.C.) page 9, while interpreting the said section 20 (1) and (2) has laid down that a subscriber committing default even in the first instalment is not a "non-prized subscriber" and hence there is no obligation on the part of the foreman to give him notice of removal.

The definition of the term "non-prized subscriber" under section 2 (12) of the Act is as under:

"Non-prized subscriber" does not include a subscriber who has defaulted in the payment of subscriptions due according to the terms of the chit agreement."

The Act defines a 'defaulting subscriber' in section 2 (5) as follows:

"Defaulting subscriber means a subscriber who has defaulted in the payment of subscriptions due according to the terms of the chit agreement."

The Act does not seem to make any distinction between degrees of default. After the chit agreement, even if the very first instalment is defaulted, the subscriber becomes a defaulting subscriber (and naturally a non-prized defaulting subscriber). However, section 2 (12) and section 20 (1) seem to be mutually inconsistent. According to section 2 (12) the term 'non-prized subscriber' does not include a defaulting subscriber; but section 20 (1) is for the benefit of a non-prized defaulting subscriber. Evidently, section 20 (1) is not happily worded. Default may occur at any time. Supposing after payment of a few instalments there is default, it can still be argued that the foreman need not observe the procedures laid down in section 20 (1) since as per the definition in section 2 (12), a defaulting subscriber is not a non-prized subscriber and hence section 20 (1) is not attracted. Even if the subscriber has defaulted in few instalments only, after paying most of the instalments, the position would be the same, as the subscriber continues to be 'defaulting subscriber' and excluded under section 2 (12). Will it not be more logical to make the foreman obliged to observe the procedures in case of all defaults? In other words, when is a subscriber, a mere 'defaulting subscriber' and not a 'non-prized (defaulting) subscriber'? Till a subscriber becomes a 'prized subscriber', he is a 'non-prized subscriber'. Till he does not commit a default and also does not become a 'prized subscriber' he continues to be a 'non-prized subscriber'. But the moment he commits default he becomes a 'defaulting non-prized subscriber'. The default may be at any time after the chit agreement is concluded, *i.e.*, even before a single instalment is remitted by him and at any time before the termination of the chit agreement.

The intention of the Legislature in enacting section 20 of the Act seems to be to protect the subscribers from the caprices of the foreman. Hence it would be desirable if the position rendered in (1976) 2 M.L.J. (N.R.C.) page 9 is reviewed and remedied.

THE SCOPE OF ARTICLE 181 OF THE LIMITATION ACT, 1908 (ARTICLE 137 OF THE NEW ACT).

ANGAMMAL v. MUHAMMAD SULAIMAN LABBAI. (1945) 2 M.L.J. 239 DISTINGUI H-ED FROM SUBRAMANIAM CHETTIAR AND ANOTHER v. MUTHIAH PILLAI, 69 L.W. 908)]

By

M. R. PRADEEP KUMAR, B.A., M.L.,
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In the judgment in *Sivan Pillai* v. *Anbayyan and others*[1], reference has been made to *Angammal* v. *Muhammed Sulaiman Labbai*[2], where Justice Somayya has observed, that the mortgagor's failure to pay the amount within the time fixed by the preliminary decree in a mortgage suit for redemption does not debar him from redeeming, until the mortgagor's right to redeem is extinguished by means of a final decree. In this case, Somayya, J., took the view that in so far as payment is concerned, no period of limitation is provided, and it will be open to the mortgagor-plaintiff, to pay at any time before the final decree debarring him from the right to redeem the property had been passed. He can even pay the amount before the confirmation of sale in pursuance of the final decree. In this case, the mortgagor-plaintiff did not deposit the amount within the period fixed by the preliminary decree. She did not even ask for extension of time under Order 34, rule 7 (2) of the Civil Procedure Code. She deposited the amount six years after the expiry of the stipulated date. When objection was taken that her claim was barred by the period of limitation under Article 181 of the Limitation Act, 1908 (which is three years) it was overruled by the learned Judge, who observed that in so far as payment is concerned, no period of limitation is prescribed.

The above case has to be distinguished from *Subramaniam Chettiar* v. *Muthiah Pillai*[3] where in Krishnaswamy Naidu, J., observed, that in a suit for redemption of a mortgage, where the preliminary decree prescribes the time for the payment of the amount due to the mortgagee and it has been paid within the time so provided in the preliminary decree, the right to apply for a final decree arises on such payment, and the period of limitation provided for such an application must be held to be governed by Article 181 of the Limitation Act, which will be three years from the date of deposit. In this case, the payment by the mortgagor was made within the time fixed by the preliminary decree. But he filed the application for final decree after the expiry of three years of the deposit. When the question arose, whether it was barred by the period of limitation or not (*i.e.*, whether Article 181 would apply or not) it was answered in the positive. In so far as the payment is concerned, no period of limitation is provided. Once the deposit is made, the period of limitation would run from the date of deposit. In other words, such a case should be held to be governed by Article 181 of the Limitation Act, 1908.

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1. (1976) 1 M.L.J. 385.
2. (1945) 2 M.L.J. 239.
3. 69 L.W. 908.

BOOK REVIEW

CONSTITUTIONAL LAW OF INDIA, Second Edition by *H.M. Seervai*, Vol. I, 1975. (Publishers: N. M. Tripathi Private Limited, Bombay-2). Price Rs. 125. for two volumes.

Mr. Seervai's book is about the best critical commentary—detached and unbiased, on the constitutional law of India. From the moment the first edition of the work appeared in 1967 it was acclaimed as a bold, thought-provoking and brilliant examination of the provisions of the Constitution of India and the decisions interpreting them. During the 8 years that have passed since then the book has attained the status of a classic.

The Constitution has, since its promulgation, undergone about 40 amendments. More extensive and radical amendments are on the anvil. What form and shape the Constitution will ultimately assume is wholly a matter for the future. Many important decisions have been rendered by the Supreme Court on the constitutional provisions. Three or four of them stand out prominently and have produced considerable repercussions, by reason of their controversial character. *Golak Nath's case*, A.I.R. 1967 S.C. 1643 —decided that Parliament could not amend the fundamental rights after 27th February, 1965. *The Bank Nationalisation case*, A.I.R. 1970 S.C. 564, had suggested that the Constitution had guaranteed a right to compensation, an equivalent in money, for the property of the banks compulsorily acquired. And *The Privy Purses case*, A.I.R. 1971 S.C. 530, ruled that privy purses were property, that the rulers could not be deprived of the same without compensation therefor, and that the right to privy purses was a justiciable right. As the author points out (p. 646) Parliament could not take these lying down, regarding them as in effect a challenge to Parliamentary supremacy. The result was the enactment of the 24th, 25th, 26th and 29th amendments to the Constitution. The paramountcy claimed for fundamental rights was denied and considerable emphasis was placed on the directive principles as constituting a sacred trust and mandate laid on the States. Circumscribing the areas of judicial review has also been suggested. The author's criticism of the *Golak Nath decision* and the impact it was likely to produce have been fully vindicated. The *Golak Nath decision* has in fact, been overruled in the *Fundamental Rights case*, A.I.R. 1973 S.C. 1461.

Be that as it may, it is a happy feature of the book that the author has expressed his views on different matters in a form that arrests attention. His observation at page 6 that "Apart from the procedural advantage conferred by Article 32 forthe enforcement of fundamental rights, a fundamental right is not different from any other right conferred by the Constitution, nor is it necessarily more important than another right which is not so described" is wholly justified. His statement at page 22 "The golden rule of interpretation that words should be read in their ordinary, natural and grammatical meaning" may be juxtaposed against the remarks of Krishna Iyer, J., in *Vaswani's case*, (1976) 2 S.C.J. 525 at 529 that "there are many canons of statutory construction, but the golden rule is that there are no golden rules". The author's remark at page 22 *apropos* of legal redress against continuation of an emergency when the emergency no longer existed, that "it must be remembered that no Court and hardly any one outside Government, has the required knowledge to form a judgment whether the continuance of the emergency is necessary or unjustified, and the matter is not made easier by the strategy and tactics of a cold war", is realistic and discerning. On the question of river-water disputes, there will be general agreement with the author's assessment at page 111: "Few governments would wish to take the responsibility of arriving at a settlement—which involves give and take—for fear of being charged with selling out the rights of their States". So adjudication by a tribunal is preferable.

The volume under review takes note of all the changes brought about till now by the constitutional amendments and judicial decisions and deals with them. The volume contains 15 chapters. Chapter I is Introductory. Chapter II covers Interpretation of the Constitution; Chapter III, Courts and the Consti-

tution; Chapter IV, the Preamble; Chapter V, the Relations of the Union and the States *inter se*, Territories of New States; Chapter VI, Citizenship; Chapter VII, Fundamental Rights—General Considerations; the State and Fundamental Rights; Chapter VIII, Violation of Fundamental Rights: Art. 13; Chapter IX, Equality: Article 14; Chapter X, Right of Equality: Articles 15 to 18; Chapter XI, Right to Freedom: Article 19; Chapter XII, Right to Freedom: Articles 20 to 24; Chapter XIII, Right to the Freedom of Religion: Articles 25 to 28; Chapter XIV, Cultural and Educational Rights: Articles 29 and 30; and Chapter XV, Rights to Property: Articles 31, 31-c. The volume provides a separate Table of Cases and an Index. It gives also the Text of the Constitution.

The Book under review gives a penetrative analysis of the constitutional provisions and the cases thereunder, and a scholarly treatment of the subject. In fine, to read the book is an education in itself.

BENTHAM'S THEORY OF LEGISLATION—With an Introduction by Upendra Baxi. (Publishers: N. M. Tripathi Pvt. Limited, Bombay-2), 1975. Price Rs. 50.

It is trite saying that laws must promise the good of the people. Law, with all its limitations, is undoubtedly one of the noblest expressions of the human struggle to make life good and worthy to live. Bentham (1748-1832) was a prophet who forced the adoption of scientific legislation upon the attention of legislators who had rarely noticed it or were alive to it. He sought to remodel the laws of England on the basis of the principle of utility and its adaptation to the circumstances of society, to the wants of men and the promotion of their happiness.

Though the idea of utility as a motive of Government action is as old as human government, Bentham proclaimed the doctrine as the sole or in any event the dominant motive and purpose of legislation and its justification. The aim of the law, according to him, should be to promote the happiness of the community. Bentham's Theory of Legislation is an original and elaborate exposition of the thesis that law is at once the instrument of social stability as well as an agency of social change and that even as it moulds social ordering it is in turn moulded by it. His test of utility as the primordial factor was based on the calculus of pleasure and pain in a particular concrete situation as indicative of real justice. According to Bentham, all individual action springs from a desire for pleasure and avoidance of pain. Though his classification of pleasures and pains is attractive, nevertheless, the theory is not practicable in view of the inherent inequality of men in temperament, equipment and outlook, so much so what is pleasurable to one may not be so to another. Nor is it possible to predicate with any pretension to accuracy the pleasures and pains of a community.

Bentham recognises that goodness of laws depends on their conformity to general expectations and to make laws seeking to effect social changes palatable to the community and to counter undescribable expectations on its part, the laws must move slowly and by indirection into areas where the community's conduct shows that they must venture but the community's mores warn them that they must not. Bentham's recipe may not always be adequate or practicable in the fast moving tempo of the present times but its relevancy cannot be gainsaid.

The book under review starts with the Principles of Legislation, It is followed by the Principles of the Civil Code and then by the Principles of the Penal Code. According to Bentham, before making a law the legislature must weigh "the evil of the offence and the civil of the law; The eivil of the malady and the eivil of the remedy". Bentham's views regarding property, marriage etc., make interesting reading. According to him, the idea of property is purely a work of the law and not natural and that if the laws are withdrawn property will cease to exist. With respect to marriage Bentham holds that marriage for life is the most natural marriage, but there should be provision for separation or divorce in cases of necessity. In Bentham's view the necessary conditions for the articulation of public

opinion and for moulding it should be ensured. To him freedom of the press and publicity of legal and administrative action are the pre-conditions for public opinion to develop.

Bentham's statement as to the Principles of the Penal Code forms a clear analysis of the subject in great detail. He classifies offences into different categories and indicates the circumstances of their aggravation or extenuation. He advises that in the choice of punishments the legislator must avoid what would be shocking to the public sentiment.

Though more than a century and a quarter has elapsed since Bentham passed away, his exposition of the theory of legislation continues to have relevance in large areas and affords proper perspective and direction in embarking on legislation at the present time.

DATTA ON THE COMPANY LAW, Second Edition by *C. R. Datta*, 1976. (Publishers: Eastern Law House Private Limited, Calcutta-700 013). Price Rs. 120, $ 20.£ 10.

The book is a commentary on the Companies Act, 1956. It gives also the related Acts, Rules, Notifications and Directions. The Companies Act is one of the longest enactments on the statute book. Its working has been the subject of constant vigil by Government with a view to cure lacunae and plug loopholes coming to the surface from time to time. Hence it has been the subject of frequent amendments. The references to managing agents, secretaries and treasurers omitted in the earlier edition of the book have been brought back in the present edition for convenience of reference. Quite a large number of decisions, English and Indian, have been taken into account and cited. The comments provided under each section are helpful as far as they go. Light from the author on such questions as whether a proceeding before the Company Law Board is of a judicial nature *stricto sensu*, whether the Company Law Board possesses inherent powers like a superior civil Court, whether section 125 of the Companies Act imposes by itself or read with other sections any legal obligation on the company creating a charge on its assets to register such charge with the Registrar, etc. would have been welcome. Decisions like *T. R. Thiagarajan* v. *Official Liquidator*, (1950) 2 M.L.J. 294 and *Meyyappa Chettiar* v. *Jayanti Films P. Ltd.*, A.I.R. 1964 Mad. 134, holding that, against the company itself so long as it does not go into liquidation a charge, though not registered, is good, could have been mentioned.

The author has covered a wide spectrum in dealing with such topics as abuse of corporate morality, lifting the corporate veil, convertible shares, etc. The author's approach to the subject is throughout practical and the instant book will be of great assistance to lawyers, companies' secretaries, chartered accountants and business executives.

CHATURVEDI'S CENTRAL SALES TAX ACT' Fourth Edition by *K. Chaturvedi*. (Publishers: Eastern Law House Private Limited, Calcutta-700 013), 1975. Price Rs. 75.

The Central Sales Tax Act, 1956, is a relatively short enactment. Its impact, however, is all embracing and nationwide. As the author neatly puts it: "From the baby-feeding bottle to the last requirements about cremation, there is a sales tax pervading all through every day". Sales tax has been producing an unfailing bountiful harvest and States have vied with each other in endeavouring to get the utmost out of it. The various problems and complications that arose in the beginning due to the different approaches and outlook adopted by the several States and the measures taken to overcome them have been competently analysed and surveyed in the Introduction provided by the author. The passing of the Central Sales Tax Act in 1956 was the culmination.

Sectionwise annotations have been provided in the light of relevant decisions, English and Indian. The Table of Cases is quite imposing. It is a pleasing feature of the work that the author has offered his criticisms forcefully albeit naively. To give but one instance: Under section

7 (2-A) and section 7 (3-A) the tax-officer is empowered to demand security, the maximum amount whereof being left to the estimate of the officer with a pretty high ceiling of tax expected to be payable for one year. Under section 3 (H) a right of appeal is given to the aggrieved dealer but exercisable only after furnishing the security demanded. The author's comment is "What a cripple". Again the author refers to the provision in section 18 making a director of a private company in liquidation personally liable for the tax dues and comments that the principle is repugnant to the soul of company law.

The book under notice furnishes also the text of the Central Sales Tax (Registration and Turnover) Rules, as well as the text of the Economic Offences (Inapplicability of Limitation) Act, 1974. That the book has passed through four editions within the space of a decade testifies to the demand for it and its popularity. The book is a dependable guide on the subject and will help lawyers and laymen alike.

CHATURVEDI'S CENTRAL SALAS TAX LAW RULES AND NOTIFICATIONS (CENTRAL AND STATES). Third Edition by *K. Chaturvedi*. (Publishers: Eastern Law House Private Limited, Calcutta-700 013), 1974. Price Rs. 50.

Not much literature of a comprehensive type is available on sales tax matters. The book under notice is a complement portion to the author's Central Sales Tax Law comprising the Act portion. Rules have been framed by the Central Government under section 13 (1) and (2) of the Central Sales Tax Act, 1956, and the State Governments have framed Rules under section 13 (3), (4) and (5) of the same Act. To collect all these Rules and present them under one volume is by no means an easy task. Each set of Rules has been indicated in the book under notice with its enacting notification and specifying the particulars of the amending notifications. The author has also furnished the exemption and rate notifications issued under section 8 (5) of the Principal Act by the different State Governments and Governments of the Union Territories. A supplement as of May, 1975 is also attached taking note of the amendments made in the Central as well as States Rules so that the Rules are kept up to date. The author frankly states in the Preface (p. 4) that "although every care has been taken to present an upto date corrected version of the Rules, the subject itself, and the paucity of literature thereon do not rule out omissions, etc., here and there".

The book under notice completes, as it were, all information regarding the Central Sales Tax Law, its administration and working. Businessmen, sales tax lawyers and the taxation authorities will find the book extremely useful and handy.

Kailasam, C.J. and
Balasubrahmanyan, J.

Devayee v. Ramaswami.

28th June, 1976. S.A. No. 2085 of 1974.

Provincial Insolvency Act (V of 1920), *sections* 28, 34—*Suit for maintenance—Husband insolvent—Leave of insolvency Court not necessary—Suit falls within section* 34 (1)—*Impact of Insolvency Act on Civil Procedure Code (V. of* 1908), *section* 60.

A wife filed a suit for maintenance against her husband who was an insolvent. The suit was resisted by the Official Receiver on the ground that the suit had been filed without getting leave of the Insolvency Court in face of section 28 (2) of the Provincial Insolvency Act. The trial Court and the first appellate Court dismissed the suit. On second appeal by the wife,

Held,

The claim to maintenance was incapable of being fairly estimated and would squarely fall under the proviso to section 33 (1) and section 34 (1) of the Provincial Insolvency Act, as being a debt which would have to be excluded from the schedule on the ground that the value was incapable of being fairly estimated. In this view section 28 (2) became inapplicable and therefore a suit for maintenance was not barred under section 28 (2). A claim for maintenance which is incapable of being fairly estimated falls under section 34 (1).

Whatever remedy the wife might have to proceed against the salary to the extent permitted under section 60 of Civil Procedure Code was not taken away by the Insolvency Act.

T. Somasundaram, for Appellant.

S.J. *Appeal allowed.*

Kailasam, C.J. and
Balasubrahmanyam, J.

Muthuswamy Naidu v. The State of Tamil Nadu by the Secretary to Government, Home Department, Madras.

15th July, 1976. W.A. No. 131 of 1975.

Tamil Nadu Buildings (Lease and Rent Control) Act (1960), *section* 29—*G.O., dated 12th August*, 1974, *exempting certain buildings—Valid.*

The object of the Tamil Nadu Buildings (Lease and Rent Control) Act, is (1) to regulate the letting of residential and non-residential buildings; (2) to control the rent of such buildings and (3) to prevent unreasonable eviction therefrom in the State of Tamil Nadu. The scope of the enactment comprises the regulation of the letting of residential and non-residential buildings which would involve the controlling of the relationship between landlords and tenants, the control of rents and prevention of unreasonable eviction of tenants.

It is clear that, where a statutory protection could either cause great hardship to a landlord or be the subject of abuse by the tenant himself, the State Government has power to exempt such hard cases under section 29. The classes of buildings have been fixed or determined only in relation to classes of landlords that owned them. In view of the decisions of the High Court and the Supreme Court it is not possible to construe the words " class or classes of buildings " as relating to buildings alone.

M. Srinivasan, for Appellant.

The Government Pleader and *R. G. Rajan*, for Respondent.

R.S. *Appeal dismissed.*

Ramanujam, J.

Mayandi *v.* Director of Tamil Nadu State Transport Department, Madras.

16*th July,* 1976. W.P. No. 1971 of 1973.

Motor Vehicles Act (IV of 1939), *section* 123, —*Madras Civil Services (Classification, Control and Appeal) Rules, rule* 17 (e)—*State Transport Department—Bus driver—Disciplinary action against—Refusal to obey superior's order to carry more than the legal capacity—Dismissal—Order not justified—Writ of* certiorari *issued—Constitution of India* (1950), *Article* 226.

An employer could not contend that as the risk of prosecution was practically negligible, the employee had to carry out the direction of the employer even by disobeying the statute. An employee is under a duty to obey the law of the land. Therefore any direction of the superior which was not permitted by the statute could not be obeyed and as such ignored. Where an employee did an act in accordance with the statute, that would be a, complete defence to any charge of misconduct for not doing an act contrary to the statute. Thus an order of the superior to violate a statutory provision could be ignored by the employee and the disobedience of such an order could not form a basis for a penalty in a disciplinary proceedings.

K. T. Palpandian, for Petitioner.

Government Pleader, for Respondent.

S.J. *Petition allowed.*

Ramaprasada Rao, J.

Syed Abbas Sahib *v.* Minor Musthiri Begum.

30*th July,* 1976. G.R.P.No. 1649 of 1975.

Tamil Nadu Indebted Agriculturists (Temporary Relief) Act (X of 1975), *section* 2 (c)—*Execution petition—Decree in respect of mahar due from husband—Husband claiming relief under the Act—Not entitled.*

Notwithstanding the fact that the husband is an agriculturist the dower debt or the mahar payable by a Muslim to his wife would not come within the privileged meaning of debt in section 2 (*c*) of the Act X of 1975 and therefore the wife is entitled to execute the decree based on the mahar debt.

S. Jagadeesan, for Petitioner.

R. Gandhi, for Respondent.

S.J. *Petition dismissed.*

Kailasam, C.J. and *Balasubrahmanyan, J.*

Anandaraju *v.* Thulasi Ammal.

25*th August,* 1976. L.P.A.No. 1 of 1976.

Mortgage—Suit for redemption—Madras Act XXVI of 1963 *coming into force —Patta granted to mortgagees—Mortgagors whether entitled to redemption — Madras Inam Estates (Abolition and Conversion into Ryotwari Act (Madras Act XXVI of* 1963); *section* 3(c).

The mortgagors' suit for redemption could not be resisted on the ground that the mortgaged property (estate) had been taken over by Government under Madras Act XXVI of 1963. The relationship of mortgagor and mortgagee continued and there could be no legal objection to the mortgagors redeeming the property and getting possession from the usufructuary mortgagee. It might be that patta was granted on the basis that the mortgagees were in possession or for any other reason. It was not within the scope of the enquiry under the Act to determine whether the plaintiffs as mortgagors were entitled to redeem the mortgage or not.

Peter Francis, for Appellants.

S.J. *Appeal dismissed.*

MENTION ABOUT COMMISSION OF ENQUIRY

By
R. THILLAI VILLALAN, M.A., B.L.,
Madras.

In our country, there is no officer equal to the Scandinavian 'Ombudsman'. Before we attained independence appointments of Commission were made rarely. But after independence, it became a 'must' in a democratic society since, it aims at maintaining a high order of public administration and of infusing confidence in the people in its administration and conduct. This is mostly against the misdeeds and mis-management of public money by Ministers or Executive Heads of States.

This is not necessarily an attempt of character assassination but this may result in regaining of lost reputation and reinfusing public confidence in the maligned members of public life.

Mr. S. K. Ghosh says "Experience of these inquiries has revealed their dangers as well as their advantages. They are inquisitional in character and usually take place in a blaze of publicity; very damaging allegations may be made against persons who may have no opportunity of denying them and against whom no legal charge of any kind is preferred. The Commission is usually presided over by a High Court Judge, who can be relied upon to mitigate these dangers as far as possible. But an inquisitional public inquiry is not easily controllable and its evil would be grave if its use were not infrequent."

On the model of The Tribunal of Inquiry (Evidence) Act, 1921 of England, the Commissions of Inquiry Act, 1952, was passed by Parliament exercising the legislative powers under Article 246, Entry 94 of List I and Entry 45, List III of our Constitution containing a dozen sections under the headings of Short Title, Extent and commencement, Definitions, Constructions of references to laws not in force in the State of Jammu and Kashmir, Appointment of Commission, Powers of Commission, Additional powers of Commission, Powers of Commission to utilise services of certain officers and investigation agencies, Statements made by persons to the Commission, Persons not obliged to disclose secret process of manufacture of goods in certain cases, Commission to cease to exist when notified, Procedure to be followed by the Commission, Inquiry not to be interrupted by reason of vacancy or change in the constitution of the Commission, Persons likely to be prejudicially affected to be heard, Right of cross-examination and representation by Legal Practitioner, Members etc. to public servants, Penalty for acts calculated to bring the Commission or any member thereof in disrepute, Act to apply to other inquiry authorities in certain cases and Power to make rules. This Act has been amended by Act LXXIX of 1971 as recommended by the Law Commission in its twenty-fourth report.

Under this Act, Rules were also framed and they are known as the Commission of Enquiry (Assessors) Rules, 1954, Rules for the Issue and Service of Summons by a Commission of Inquiry, 1955 and the Central Commissions of Enquiry (Procedure) Rules, 1960.

The English Act which was the model Act was referred for review to a Commission of Enquiry under the Chairmanship of Lord Justice Salmon in England on 28th February, 1966. The other members were Stuart, Goodman, W. L. Heywood, J. B. Batterworth and H. W. R. Wade. They submitted their

report on 1st November, 1966 with suggestions for many amendments.

There is another English Act, Tribunals of Inquiry (Evidence) Act, 1921. There are similar Acts in different countries of the world. In Canada, there is the Inquiries Act, 1927. In Ceylon, there is the Ceylon Commissions of Inquiry Act, 1948. In Australia there is the Royal Commissions Act, 1902-03. In Africa there is no such Act.

In our country several Commissions were set up for various purposes to enquire into police firings, Railways and Bus Accidents, Death in police custody and murder of important leaders. Naturally we are more interested in the Commissions of Inquiry either by the Centre or by States against ministers and prominent persons in public life.

The following are worth mentioning in the present context.

(1) Chagla Commissions which ended in the resignation of then Finance Minister T. T. Krishnamachari (1957); (2) Das Commission set up to inquire into allegations of corruption against Sardar Pratap Singh Kairon, Chief Minister of Punjab (1963); (3) Ayyangar Commission to inquire into the conduct of Bakshi Gulam Mohammed, then Chief Minister, (Jammu and Kashmir (1965); (4) Khanna Commission to inquire into the allegations against Mr. Biju Patnaick and other ministers of Orissa (1967); (5) Aiyar Commission to inquire against the conduct of Mr. Krishna Ballabh Sahay and other ministers of Bihar (1967); (6) Mudholkar Commission to inquire into the allegations against Mr. Mahamaya Prasad Sinha and 13 other Ex United Front Ministers of Bihar (1968); (7) Sarju Prasad Commission to inquire into charges against Dr. Hare Krishna Mahatab, former Chief Minister of Orissa (1971); and (8) S. R. Sarkaria Commission to inquire into allegations of corruption levelled against Mr. Karunanidhi, ex-Chief Minister and some other ministers of Tamil Nadu (1976).

Important decisions under this Act which will cover the object, scope, constitutional validity, powers and functions of the Commission, contempt of Commission and other procedural matters, are chronologically the following: *M. V. Rajwade I. A. S., District Magistrate* v. *Dr. S. M. Hassan and others*[1], *Shri Ram Krishna Dalmia and three others* v. *Shri Justice S. R. Tandolkar and three others*[2], *Sri Narayandoss Mahant and another* v. *Sri. T. Neeladri Rao and another*[3], *M/s. Allen Berry and Company Private Limited and another* v. *Vivian Bose and others*[4], *The State of Jammu and Kashmir and others* v. *Bakshi Gulam Mohammed and another*[5], *P. V. Jagannath Rao and others* v. *State of Orissa and others*[6], *P. K. Kunju* v. *State of Kerala and others*[7], *Dr. Hare Krishna Mehatab* v. *The Chief Minister of Orissa and others*[8], *Sambhad Nath* v. *Kedor Prasad Scriha and others*[9], *Serja Rao Kondibaba Sagar* v. *P. G. Karnik and others*[10].

The latest case under this Act is *M. Karunanidhi* v. *The Union of India represented by the Secretary to Government, Cabinet Secretariat Department of Personnel and Administration Reforms.* The Commission of

1. A.I.R. 1954 Nag. 71.
2. 1959 S.C.J. 147 : 1959 S.C.R. 279 : A.I.R. 1958 S.C. 538.
3. (1959) 1 An.W.R. 258: A.I.R. 1959 A.P. 148.
4. A.I.R. 1960 Punj. 86.
5. (1966) S.C.R. (Supp.) 401 : A.I.R. 1967 S.C. 122.
6. A.I.R. 1960 S.C. 275.
7. A.I.R. 1970 Ker. 252.
8. A.I.R. 1971 Orissa 175.
9. (1972) 3 S.C.R. 183: A.I.R. 1972 S.C. 1515.
10. A.I.R. 1973 Bom. 171.

Enquiry headed by Hon'ble Mr. Justice R. S. Sarkaria, Supreme Court of India, New Delhi[1].

In this case, Kailasam, C.J. and Balasubramanyam, J., decided against the grounds raised by the petitioner.

"The first and foremost grounds stated is as follows: "The Constitution of India has set up a federal system of Government in which the Union and the States derive their respective powers from the Constitution and exercise those powers from the Constitution in their own right. According to the scheme of the Constitution, the States are not subordinate to the Union. Moreover, the Constitution has established a Parliamentary system of executive in the States; according to which the Council of Ministers is responsible to the elected representatives of the people in the Legislative Assembly for the good Government of the State". According to the petitioner, the duty referred to in Article 355 does not extend to the Central Government laying down standards of good government for the State Governments and enforcement of such standards by threat of exposing recalcitrant State Ministers to an inquiry under the Commission of Inquiry Act for what in the opinion of the Central Government might constitute maladministration. The other grounds were summarised by the learned counsel for the petitioner thus:-

(i) The Commission of Inquiry should be appointed to enquire into a definite matter of public importance; (ii) Satisfaction of the requirements of section 3 of the Commission of Inquiry Act is vitiated by the notification not disclosing the names of persons, who are to be subjected to the enquiry and the purpose; (iii) The power under section 3 of the Act has not been used for the purpose for which it is conferred, but it has been abused; (iv) Opinion is not of the Central Government in so far as it is not expressed to be taken in the name of the President, but has been taken by a department, to which the particular subject has not been allotted by the Central Government by the Government of India (Allocation of Business) Rules, 1961; and (v) The Tamil Nadu Public Men (Criminal) Misconduct Act, 1973 (II of 1974), precludes recourse to the Commission of Inquiry Act for the purpose of enquiring into the misconduct of former Ministers of the State of Tamil Nadu.

We will, first of all, take up the question which was stressed at great length before us, that is, that the federal nature of the Constitution does not empower the Central Government to lay down standards of good Government for the State Governments and to initiate an enquiry under the Commissions of Inquiry Act for what, in the opinion of the Central Government might constitute maladministration. It is stated that taking into account the federal character as the basic structure of the Constitution, section 3 cannot be construed in such a way as to militate against the basic principles of federalism. According to the learned counsel for the petitioner, section 3 of the Act was construed by the Central Government so as to empower it to order an enquiry against State Ministers also, subordinating the State Ministers to the control of the Union Government, which is not at all warranted by the Constitution. The contention of the learned counsel is that the Constitution is a federal one and that the States are autonomous having definite powers. The basis of the argument is that States being auto-

1. W.P. No. 1542 of 1976, dated 29th April, 1976.

nomous in a federal structure, they have got independent rights to govern, and that so far as their executive actions are concerned, the Central Government has no right to interfere. The learned counsel was at great pains to state what a federation is, what autonomous States are and what are the rights and functions of the federating States. We feel that the words "federation", "autonomy" and "federating States" have varying meanings and what a particular word means will depend upon the context. For example, there may be a federation of independent States, as in the case of United States of America. As the name itself denotes, it is a union of States, either by treaty or by legislation by the concerned States. In those cases, the federating units gave certain powers to the federal Government and retained some. To import "autonomy" used in the context of the American Constitution, to our Constitution will be totally misleading. Taking the history of the Indian Government under the 1919 Act it was principally a unitary Government. In 1935, there was some attempt at federation in the context of presence of Indian States. As it is well-known, Indian States were governed by the Rulers of the States subject to paramountcy and when they were proposed to be drawn into a federation consisting of what was known as British India and the Indian States. The 1935 Constitution was framed in order to achieve this object. Ultimately, the present Constitution came to be framed. The feature of the Indian Constitution prescribes the powers of the Central Government and the powers of the State Governments and the relations between the two. In a sense, if the word "federation" can be used at all, it is a federation of various States which were designated under the Constitution for the purpose of efficient administration and governance of the country. The powers of the Centre any the States are demarcated under the Constitution. It is futile to suggest that the States are independent, sovereign or autonomous units which had joined the federation under certain conditions. No such State ever existed or acceded to the Union. When the Constitution was framed, in Part XI of the Constitution the relations between the Union and the States are set out. Articles 245 to 248 of the Constitution demarcate the powers between the Centre and the States. In Article 246 (4) it is provided that the Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List. Three Lists are drawn up in the Seventh Schedule. List I is Union List, List II is State List and List III is Concurrent List. It is significant that in List I, Entry 97 it is provided that any other matter not enumerated in List II or List III including any tax not mentioned in either of these Lists would fall within the purview of the Union List. This will have to be read along with Article 248 which provides that the Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List and that such power shall include the power of making law imposing a tax not mentioned in any of those lists. That the power of the Parliament extends to legislate in all matters not covered by Lists II and III cannot be questioned, for, it has been so laid down in *Union of India* v. *H.S. Dhillon*[12]. At page 1069 of the report, Chief Justice Sikri has stated the position thus:

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12. (1972) 2 I.T.J. 258: (1972) 2 S.C.J. 397: (1972) Tax L.R. 449: 83 I.T.R. 582: (1972) 2 S.C.R. 33; A.I.R. 1972 S.C. 1061.

"At any rate, whatever doubt there may be on the interpretation of Entry 97, List I is removed by the wide terms of Article 248. It is framed in the widest possible terms. On its terms the only question to be asked is: 'Is the matter sought to be legislated included in List II or in List III or is the tax sought to be levied mentioned in List II or in List III. No question has to be asked about List I. If the answer is in the negative, then it follows that Parliament has power to make laws with respect to that matter or tax."

According to the Constitution, as construed by the Supreme Court, there could be no difficulty in concluding that the State as such has no inherent power or autonomous power which cannot be encroached upon by the Centre. The powers of the Centre and the States will have to be looked for in the Lists and other Articles in the Constitution.

The theory of federation and the State having some powers apart from the Constitution is without any basis, for, it will be seen that under Article 3 of the Constitution, the Parliament may by law form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State, increase the area of any State, diminish the area of any State, alter the boundaries of any State and alter the name of any State. This has in fact been done. With a view to form linguistic States for the better administration, the boundaries of the States were realigned in some States and new States were formed. If the words "federation" and "autonomy" have to be given any meaning, certainly it would not mean that the States have any existence apart from that provided under the Constitution. The very fact that the President has powers to take over the administration of the States, which is not disputed, would demolish the theory of any independent or autonomous existence of a State. These undeniable facts can give no room for the contention of the learned counsel for the petitioner that the Central Government is not empowered to order an enquiry against State Ministers, subordinating the State Ministers to the control of the Union Government. On the other hand, the proper thing to do is to determine whether section 3 of the Commissions of Inquiry Act, 1952, is *intra vires* the powers of the Central Government and whether the notification issued by the Central Government under section 3 constituting what is known as Sarkaria Commission, is valid. The learned counsel for the petitioner did not question the competence of the Parliament to enact the Commissions of Inquiry Act, and its validity was not questioned.

But what the learned counsel contended was that under section 3 of the Act the notification should not only appoint a Commission of Inquiry for the purpose of making an enquiry, but also specify the definite matter of public importance for the purpose of making the enquiry and the persons against whom the enquiry is directed also should be mentioned. In other words, according to the learned counsel the notification is invalid, as it fails to comply with the requirements of section 3 of the Act. Referring to the actual notification, the learned counsel submitted that the purpose of appointing the Commission of Inquiry is to enquire into the allegations namely, (i) the allegations contained in the memorandum dated 1st December, 1975 received from Sarvashri K. Manoharan and G. Viswanathan, addressed to the President; and

(ii) such of the allegations contained in the memorandum dated the 4th November, 1972, received from Shri M. G. Ramachandran and Memorandum dated the 6th November, 1972, and 20th December, 1972, received from Shri M. Kalyanasundaram, M.P.; as are specified in the Annexure to the notification.

The annexure refers to 27 allegations.

The contention of the learned counsel that the terms of reference do not refer to any definite matter of public importance with regard to the memoranda submitted by K. Manoharan and G. Viswanathan, and that the absence of such a mention vitiates the notification is unacceptable for, what section 3 requires is that the Commission of Inquiry should be appointed for making an enquiry into any definite matter of public importance. That the allegations contained in the memoranda are definite matters of public importance cannot be questioned. In *State of Jammu and Kashmir* v. *Bakshi Gulam Mohammad*[13], the Supreme Court had occasion to deal with a Commission of Inquiry that was ordered against a Chief Minister, who ceased to be the Chief Minister at the time when the Commission of Inquiry was ordered. The Court held that the fact that a person is no longer in office does not affect the question whether his acts already done constitute matters of public importance and that if once it is admitted that if he had been in office his acts would have been matters of public importance, that would be acknowledging that his acts were of that character. A Minister, of course, holds a public office and his acts are necessarily public acts if they arise out of his office. If they are grave enough, they would be matters of public importance. When it is alleged that a Minister has acquired vast wealth for himself, his relations and friends as was done here, by abuse of his official position, there can be no question that the matter is of public importance."

The Court proceeded to observe :

"It is of public importance that public men failing in their duty should be called upon to face consequences. It is certainly a matter of importance to the public that lapses on the part of the Ministers should be exposed. The cleanliness of public life in which the public should be vitally interested, must be a matter of public importance, the people are entitled to know whether they have entrusted their affairs to an unworthy man. It is, therefore, clear that the subject-matter of the enquiry in this case is a matter of public importance. The learned counsel for the petitioner attempted to show that it may be a matter of public importance, but not a definite matter of public importance. We do not see any substance in this contention, for, the matters that are referred to the Commission of Inquiry are matters that are contained in the memoranda given by named persons and these allegations relate to definite matters. We have no doubt in coming to the conclusion that the requirements of section 3 of the Act are complied with."

The Commission of Enquiry Act is a moral Act to annihilate political immorality from the country. Mere having an arrow will not shoot the bird. It depends upon the skill of the person who is having the bow and arrow together.

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13. (1966) S.C.R. (Supp.) 401: A.I.R. 1967 S.C. 122.

BOOK REVIEW

LAW OF BONUS by *P.R. Bagri.* (Publishers: Eastern Law House Private Limited, Calcutta-700 013). 1976. Price Rs. 80; $ 15 : £8.

The Payment of Bonus Act, 1965, is a comprehensive enactment dealing with the subject of bonus in all its aspects. The book under notice provides a commentary on the provisions of the Act. 'Bonus' which originally meant an extra payment to workmen had evolved itself in course of time as a right in the sharing of profits made possible by the contribution of both capital and labour in any industry. In still later times this link of bonus with profits has come to be somewhat modified. The codification of the bonus law in the form of the 1965 Act has made the payment of minimum bonus obligatory even in a year of loss. Under the Payment of Bonus (Amendment) Act, 1976, bonus shall be on the basis of profits or on the basis of production or productivity. The Amending Act has also fixed the minimum bonus at 4 per cent. The concept of 'bonus' as sharing of profit has lost face inasmuch as it has become debatable whether it operates as an incentive to production in practice.

The instant book considers the law relating to bonus as it stood prior to the 1965 Act, the law as it operated under the provisions of the 1965 Act till the Amending Ordinance of 1975, and the law subsequent thereto. Almost all important cases, English and Indian, have been taken into account. A few more could have been mentioned. The decision in *Major D'Aranha* v. *Universal Radiators, Coimbatore*, (1974) 46 F.J.R. 96 holding that a dispute regarding bonus must be adjudicated in the regular way and not via an application under section 33-C (2) of the Industrial Disputes Act, differing in the process from the Bombay decision in (1970) 39 F.J.R. 409 does not seem to have been noticed. The problems relating to the calculation of gross profits and profits available for allocation have been carefully analysed and discussed. The text of the Payment of Bonus (Amendment) Act, 1976 (XXIII of 1976) is provided in the Supplement attached to the book. The book is a commendable addition to the literature on the subject.

URBAN LAND (CEILING AND REGULATION) ACT AND RULES by *B. Malik* (Retired Chief Justice, Allahabad High Court) and *Jagdish Lal.* (Published by Law Publishers, Allahabad-1). 1976. Price Rs. 55.

This book is a commentary on the Urban Land (Ceiling and Regulation) Act, 1976 (XXXIII of 1976) with Rules and Notifications. Imposition of a ceiling on urban property-holding is a sequel to imposition of a ceiling on agricultural landholding which has been the subject of legislation by the different States. To ensure uniformity in approach, Parliament, acting on resolutions adopted by eleven States under Article 252 (1) of the Constitution empowering it to undertake legislation on their behalf, enacted the Urban Land (Ceiling and Regulation) Act, 1976. The Act contains 47 sections and two schedules. It provides for (i) imposition of ceiling on both ownership and possession of vacant land in urban agglomeration; (ii) acquisition of the excess vacant land by the State Government and disposal thereof; (iii) payment of an amount for the acquisition in cash and bonds; (iv) granting exemptions, (v) regulating transfer of vacant land within the ceiling limit, (vi) regulating transfer of urban or urbanisable land with any building; (vii) restricting plinth area in respect of future constructions of residential buildings; and (viii) other procedural and miscellaneous matters. In regard to the meaning to be given to words and terminologies used in the Act which may not have been defined in the Act itself, the authors have pressed into service rulings given by superior Courts of law in the context of other enactments which may have some bearing in relation to such words and terminologies. The annotations given are lucid and copious. It may be that, that having regard to the status of the authors, a review by them of the characteristic features of the Act, the practical difficulties likely to arise in applying the Act and the obscurities and lacunae in the Act, will be well appreciated. Be that as it may, the instant book is about the first comprehensive commentary on the provisions of the Urban Land (Ceiling and Regulation) Act. It is sure to be of considerable assistance to lawyers, executive

authorities and to all interested or having interests in urban landed property.

SOCIAL MISSION OF LAW by *V. R. Krishna Iyer*, 1976. (Publishers: M/s. Orient Longman). Price Rs. 25.

Law is a social science. At the present time, it is increasingly regarded as an instrument of social engineering. Its function is held to be not so much to change with changing social and economic conditions but to ensure justice, social and economic. It is in this that its justification and validity lies. In the achievement of this task, the law-maker, the Judge, the lawyer and the law enforcing machinery has each a vital role to play. Many feel that if the image of law, the law Courts and the legal profession has suffered in this country today it is due to their failure to shake off the British colonial moorings and their persisting with nineteenth century approaches to problems engendered by the social and economic milieu of the present times. The essays brought together in the instant book project these aspects. They are full of sociological sense marked by deep thought and legal wisdom and revealing missionary zeal.

Few will be inclined to dispute the author's sapient observation that "sans sociologically animated law, the printed statute is inert paper". There is much to be said for the author's observation: 'among the socio-political instrumentalities which modern communities use to ensure peaceful progress is the legal process as the initiator, engineer and inhibitor. No law no order; no order no law is axiomatic. Likewise absent law, planned development can become tyranny; regulated juridically chaos in the cosmos can be kept down to the minimum". The author's views on certain matters may provoke dissent. His thesis that the Court can be a constructive instrument for social change and may educate the politician given the right orientation, his plea for a "directional" shift in judicial philosophy and his remark that the Indian Judges can be vigorous participants in the juridical sphere and to remain silent is to fail democratic legality may not be readily accepted. The duty of the Judge is to interpret the law as dished out by the legislature keeping in mind the spirit behind the particular enactment and the spirit of the times and to keep himself away from politics and political programmes. By and large, the Judges have been alive to Justice Frankfurter's admonition: "If Judges want to be preachers they should dedicate themselves to the pulpit; if the Judges want to be primary shapers of policy the legislature is their place". If law is costly it is mainly due to Government; if law is dilatory it is often due to the cumbrous procedural law. If Judges have of late, been the subject of criticism, it is mainly because of the "self-styled species called politicians whom ignorance does not inhibit nor wisdom circumspect" presenting "the alibi of Court rulings for their failures".

The author's advocacy in favour of a common code of laws for all communities is an able presentation of the need for it in the interests of national integration. His forceful call for reform of the criminal law and for revised thinking in regard to the treatment of criminals is timely and pertinent.

The book breathes a high and serious purpose throughout. It is interspersed with legal wisdom, enriched by experience. There is no doubt that the book will set people thinking. Its outspokenness makes it all the more valuable. "Even the ranks of Tuscany can scarce forbear to cheer".

PRIVY COUNCIL, FEDERAL AND SUPREME COURT TAXATION DIGEST, 1922 TO 1974, by *S. K. Agrawal*, 1975. (Publishers: Law Book Co., Allahabad-1.). Price Rs. 60.

To the busy legal practitioner a digest of the law in any of its branches as expounded by the highest Court is verily a boon and a time-saving tool. Among the several branches of law, not only because of its importance but also because of the complexity and the wide range of problems which Courts have to unravel, the field of taxation stands out prominently. In such a field the decisions of the highest Court are the most important and valua-

ble naturally. Does not Article 141 of the Constitution specifically lay down that the law declared by the Supreme Court shall be binding on *all Courts* within the territory of India? Equally the Central statutes on taxation command the largest attention in view of their generally applying to the whole of India. The instant digest has taken into account all the decisions of the highest Court rendered over a period of more than half a century expounding the taxation provisions found in different statutes. The law so covered is that contained *inter alia* in the Business Profits Tax Act, 1947; the Estate Duty Act, 1958; the Excess Profits Tax Act, 1940; the Expenditure Tax Act, 1957; Finance Acts of successive years; The Gift Tax Act, 1958; the Income-tax Acts of 1922 and 1961; the Income-tax and Excess Profits Tax (Amendment) Act, 1947; and the Wealth Tax Act, 1957.

The interpretation placed on each section is stated in the very language of the judgment as far as possible. The points elucidated in each decision have been culled with care and presented distinctly. In passing, attention may be drawn to an error, not noticed perhaps, in the outer cardboard cover where the word *Federal* has been set as *Fedral*.

The book is bound to be of great assistance to the members of the Bar particularly to those who are engaged in practising in the field of taxation.

SUPREME COURT SALES TAX DIGEST' 1950-1972, by *S. K. Agrawal*, 1973. Published by Law Book Co., Allahabad-1.

The instant book is a digest of sales tax law contained in several statutes as interpreted and elucidated by decisions of the Supreme Court with reference to the provisions contained in such statutes, rendered over a period of about 25 years. The statutes covered are both Central and States legislation. Also covered are the Pondicherry General Sales Tax Act, 1965; the Pepsu General Sales Tax Ordinance (XXXIII of 2006 S), the Travancore-Cochin General Tax Acts, 1125 M.E. and 1925; The Travancore-Cochin Sales Tax Rules 1950 etc. The Digest sets out the matter in the very language of the judgments. Separate notes are provided for each of the many points emerging from the judicial exposition. Important pronouncements have been made by the Supreme Court since 1972. The utility of the book will be enhanced if those cases are also given in a supplement. The book under notice is a welcome addition to the literature on the subject.

ANATOMY OF AMENDMENTS TO DIRECT TAXES ACTS by *Darshan Kumar*, 1976. (Publishers: N. M. Tripathi P. Ltd., Bombay-2). Price Rs. 25.

In a modern society taxation is an instrument of planning, used to achieve the economic and social goals of the State and modulated to meet the exigencies of the situation. This, along with the necessity to plug the loopholes revealed by constant attempts to evade payment of taxes has resulted in frequent amendments of the tax laws. A person has, therefore, to make an intelligent appreciation of the incidence of tax under such laws and take it into account in the ordering of his affairs. The Direct Taxes Acts considered in the book under notice are the Income-tax Act, the Wealth-tax Act and and the Gift-tax Act. The author has not only attempted to highlight the salient features of the amendments wrought into these Acts but also to explain their incidence on the real life situation drawing attention, in the process, to the opportunities for tax planning under the amended law. The book is split into 4 divisions. Division I is devoted to budget proposals. Division II deals with Amendments relating to the three Acts. Division III provides Tables and Charts to facilitate understanding. Division IV covers Prospective Amendments, Voluntary Disclosure of Income and Wealth, etc., There will be general agreement with the author's conclusion: "The protentous problems facing the country can be solved not by budget alone but only if the major instruments of economic planning are operated in harmony and with imaginative vision by the Government and full co-operation by its citizens". (page 7.). The author has, in the instant book,

expounded his subject in a simple and practical manner, interestingly and easily intelligible to the reader. Tax-consultants, businessmen and others will find it profitable to study the book.

SRINIVASAN'S HINDU LAW OF PARTITION AND INCOME-TAX LAW, SECOND EDITION Revised by Dr. *K. Malik* (retired Chief Justice, Allahabad High Court), 1976. (Publishers: Delhi Law House, Allahabad—1). Price Rs. 55.

The subject-matter of the book is laid out in three chapters. Chapter I deals with Partition in General; Chapter II with Partition under the Income-tax Act; and Chapter III with Various Modes and Phases of Partition, The Preface draws pointed attention to the fact that unless and until a partition in a Hindu joint family has been accepted under section 171 of the Income-tax Act of 1961 by the Income-tax Officer it is not complete in the eyes of the Income-tax law although there may be a partition acceptable to Hindu law. The law embodied in section 171 of the Act and certain other sections is stated in the Introduction which also deals with Possession of Gold Ornaments and Gold Control Act, 1968 and some provisions from the Urban Land (Ceiling and Regulation) Act, 1976. One or two things in the book are somewhat baffling. At page 1, the very first para opens with the statement "The right of partition postulates a later development of archaic law. *As stated before*······" Where the "*before*" is to be located is not apparent. Again at page 7, in Chapter I, section 96 is ushered in abruptly without any indication as to where the earlier 95 sections lie and with what they deal. The statement at page 57: "It is not correct to say that after notice of severance the father has lost the power of partition by metes and bounds" is rather debatable. In the discussion under the caption "Who can claim partition" the impact of the decision in *Sridharan* v. *Commissioner of Wealth-tax*, A.I.R. 1970 Mad. 149, holding that the son of a separated Hindu through a marriage with a Christian woman solemnised under the Special Marriage Act, brought up as a Hindu, is a legitimate son, a descendant, who could claim to have the status of being a member of the joint family of which his father, the assessee was the head, could have been considered. These are however relatively small matters.

There is no doubt that the book gives a full and vivid exposition of the Hindu law of Partition and Income-tax law taking into account the relevant case law. The book will afford valuable assistance to chartered accountants., income-tax lawyers and practitioners, businessmen and banks and others.

LAW RELATING TO COMPANY DEPOSITS by *R.S. Gae*, 1976. (Publishers: Eastern Book Co., Lucknow—226001). Price Rs. 25.

Company deposits have become a popular and attractive form of investment with the public. The phenomenon persists despite disincentives imposed by law to non-banking companies accepting such deposits, like disallowance of 15 per cent interest on the deposits as deductible expenditure for income-tax purposes from 1st April, 1976. The popularity of company deposists is due to the lower rates of interest which the banking institutions pay. To regulate such deposits, with emphasis on protection of the interests of the depositors Government has taken some measures. Sections 58-A and 58-B have been inserted in the Companies Act of 1956 by the Companies (Amendment) Act, 1974, for this purpose and the Companies (Acceptance of Deposits) Rules, 1975 have also been made. Publicity in the form of advertisement in the newspapers showing the management personnel of the company inviting deposits and the financial position of the company is made obligatory in the interests of the public. The provisions under sections 209-A, 235 and 237 are also designed in the interest of the public. In appropriate cases, the Registrar can inspect the accounts of the company; similarly Government can direct an investigation of the company's affairs. How far public interests are effectively ensured by all these provisions is one of the matters dealt with by the author.

The book under notice consists of 6 chapters. Chapter I gives the background. Chapter II deals with the statutory provisions in sections 58-A and 58-B of the Companies Act and their scope, effect and impact; and Chapter III with the Rules as amended up to 29th November, 1975. Chapter IV deals with the restrictions on dividends forming an important factor leading to a spurt in company deposits. Chapter V is devoted to company deposits and income-tax analysing the relevant provisions of the Income-tax Act of 1961. Chapter VI sets out the author's conclusions and suggestions for the further amendment of the Companies Act and the Companies (Acceptance of Deposit) Rules. There are 5 appendices, the first four containing extracts from the Companies Act, 1956 and the Companies (Acceptance of Deposits) Rules, 1975; from the Income-tax Act of 1961; and from the Reserve Bank of India Act of 1934, directions issued under Chapter III-B of that Act and the Companies (Temporary Restrictions on Dividends) Act of 1974 respectively. Appendix V gives the press release by the Reserve Bank of India on 18th October, 1975, entitled "Report of the Study Group on Non-Banking Companies—Reserve Bank accepts main recommendations".

At more than one place, the author points out that it is for the depositors to ensure the creditworthiness and soundness of the financial position of the company in which they intend to make deposits, that neither the Central Government nor theReserve Bank is in a position to guarantee or ensure for the repayment of the deposits made with non-banking companics, that the protection afforded by sections 58-A and 58-B and other provisions of the Companies Act is not absolute protection. This, conclusion of the author correctly appreciates the legal position. The book reveals an able and lucid study by the author of the legal and practical aspects of the law relating to company deposits. The book will be of immense benefit to chartered accountants, company executives and secretaries, lawyers and to all interested in the economic development of the country.

HANDBOOK ON PROFESSION TAX by *B. G. Merchant* and *A.M. Merchant*, 19/6. (Publishers: Vora Prakashan, Ahmedabad). Price Rs. 4.

Profession tax is levied in virtue of the provisions of Article 276 of the Constitution of India by a number of States with a view to augment their financial resources. If one State takes action, the other States also follow the example, in taxation matters in particular. The handbook is in fact a commentary on the Gujarat State Tax on Professions, Trades, Callings and Employments Act, 1976, as the authors themselves have stated. The comments and explanatory notes sectionwise provided by the authors will be useful to all concerned with or affected by the provisions of the Act.

THE LAW RELATING TO PROTECTED LICENSEES by *J.H. Dalal*, 1976. (Publishers-N.M. Tripathi P. Ltd., Bombay-2). Price Rs. 30.

Rent Control legislation is a familiar feature of modern urban life. In the State of Maharashtra, the pivotal legislation is the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. The parent Act has undergone numerous amendments for plugging loopholes and providing for new situations and problems. The latest edition of the author's book on the parent Act was in 1969. At that time the Act had dealt with the relationship of landlord and tenant as understood under the Transfer of Property Act but did not deal with what was known as licensee under the Easements Act. An amendment to the parent Act for extending its protection to certain licensees was effected in 1973 and there were other amendments as well. Inasmuch as the author could not find time to rewrite his book incorporating all the amendments to the parent Act, it is stated that the author has, in the instant book given a full commentary on the different major amendments being the Acts XVII of 197?, LI and LVII of 1975, of the Maharashtra Legislature. Precise and accurate summaries of 500 cases have been given. The

changes effected in the law relating to permitted increases (Act XLIV of 1963), increase in ground rent (by Act XVII of 1973) and the Residential Premises Tax Act (XIX of 1974) have also been touched upon.

The instant book is indeed a supplement to the book on the parent Act. Providing a supplement is not a happy substitute in the place of a conspectus of the entire legislation on the subject incorporating all the subsequent amendments into the texture of the parent Act. But the exhaustive and luminous annotations on the provisions of the amendments in the light of case-law has largely redeemed the position. The author has expressed his criticisms and view points at various places, for instance, his comment at pages 50-52 on the definition of "paying guest" is cogently argued and will be generally accepted. The book is a welcome publication, of great help to the practising lawyers in their everyday work and also to the rent control authorities and Judges.

HOUSING (A MANUAL OF CONSTRUCTION AND OWNERSHIP) by *C.H. Gopinatha Pao* and *K. Soundarraj,* 1975. Copies available with the Authors at 20-B, Oliver Road, Mylapore and IH/5 A.R.K. Colony Eldams Road, Madras-18. Price Rs. 5.

Everyone needs a house and desires to own one. Financial facilities for acquiring a house or building one are at the present time relatively more easily available. In purchasing a 'plot or constructing a house care has to be taken at every stage against being decieved or exploited by unscrupulous estate agents, building-contractors and other persons. The instant book sets out the legal and technical details to inform and forewarn the unwary prospective owners of property. Part I of the book concerns itself with the engineering aspect and Part II with the legal aspect. The book is designed and written as a valuable guide to all prospective purchasers of real estate. Forms of Sale Agreements, Draft Sale Deeds, etc. provided at the end add to the usefulness of the book.

MAHARASHTRA RECOGNITION OF TRADE UNIONS AND PREVENTION OF UNFAIR LABOUR PRACTICES ACT, 1971, WITH RULES by *V.P. Shintre,* 1975. (Publishers: M/s. Orient Longman, Bombay). Price Rs. 10.

Trade Unions grow *pari passu* with industrialisation. Their collective bargaining power gives them strength. But even within the same trade, rival unions develop due to various causes; consequently their effectiveness suffers. Further, inter-union trade rivalry engenders unfair labour practices both by the employer as well as the employees, seriously jeopardising industrial peace and labour welfare.

The Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971, has been in force from 1st September, 1975. The legislation is the first of its kind in India providing statutorily on this matter. Though a good definition of unfair labour practice is still proving elusive, the Maharashtra Act has listed such practices in Schedules II, III and IV of the Act. The Act provides also for new Industrial and Labour Courts with full powers to hear suits filed under the Act.

The instant book gives the text of the Act providing clear and adequate explanations and notes regarding the salient features of the Act. It gives also the Rules governing applications by trade unions for recognition and de-recognition and the Forms provided by the Act. The book will be helpful to employers and employees, legal practitioners and students of labour law.

A PLEA FOR AMENDING THE DEBT RELIEF ACT XXXI OF 1976.

By

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Twice, writs impugning the Tamil Nadu Debt Relief Act XXXI of 1976 have been dismissed in admission. The High Court has held that the Act is *intra vires* but has not gone into the hardships and anomalies in the Act.

Debt relief legislation is something to promote and protect and not to negative or liquidate completely the creditors and their dues by giving unjust enrichment to debtors. At least the principal must be made repayable or a provision similar to section 8 of Act IV of 1938 as amended by Act VIII of 1973 or section 7 of Act XXXVIII of 1972 has to be introduced. By the annihilation of creditors and complete liquidation of debts the Act is un-reasonable as total liquidation is not a reasonable restriction.

Under the Act, for landless agricultural labourers and rural artisans annual income of Rs. 2,400 is the basis and for the small farmer, extent is the basis. Due to drought, there has been no income to the farmer. Just as income for the first two, has to be determined, in the enquiry a similar provision to determine the income for the small farmer may also be made. Further, usufructuary mortgagees by enjoyment might have realised more than the principal. This has to be considered. The farmer-owner-agriculturist would not have had any income in such cases. He ought not to be considered as a holder of such land under section 2 (1) without getting any income.

The unit of land is different for a scheduled caste or a scheduled tribe and backward class debtor. This is not a reasonable classification. Poverty is to be considered on the basis of income, and not on the basis of communities. There should be uniformity.

There seems to be hostile discrimination between section 4 (*a*) and section 6 (4) and section 13 (*g*). A non-banking creditor has not only to return the pledged article but has to pay his banking creditors. so, at least, the difference between the loan and the repledging should be made payable.

No provision is made for voluntary discharge by debtors after 29th July, 1976. As the period under section 5 is fixed as 60 days under rule 3, there should not be a stalemate even when the debtor wants to redeem the pledge or when the creditor is willing to be redeemed either on or without, payment. There should be provision for compromise under Order 23, Civil Procedure Code. There should be a provision for mutual adjustment, discharge and redemption out of Court.

Conferring jurisdiction on the Tahsildar runs counter to Article 50 of the Constitution. The Tahsildar is also given police powers.

Under section 9, legal practitioners can't represent parties. But in the Explanation he is defined as an advocate under section 2 of the Advocates Act, 1961. There are pleaders outside the Advocates Act and authorised representatives are permitted to appear. Can legal practitioners appear as authorised representatives under power of attorney? A new class of unlicensed legal practitioners would be created, contrary to the Advocates Act and the Legal Practitioners Act. This is to open the flood gates to "Touts".

Under section 10, an offender is made liable to imprisonment for a term of not less than 3 months and not more than

one year and to a fine of not less than Rs. 1,000 and not more than Rs. 5,000. No forum is mentioned. But section 29 (2) and (3), Criminal Procedure Code, defines the powers of Magistrates. A first class Magistrate can fine upto Rs. 5,000 but a second class Magistrate cannot fine more than Rs. 1,000 and imprison for more than one year. To which Court, a 'cognisable' case is to be sent and by whom, and whether the imprisonment is simple or rigorous are not clarified. The prosecuting officer is given a wide discretion to choose the forum.

Costs of suits pending on 29th July, 1976 are not provided for. In fairness, the Government should refund the Court fees collected.

Though the Act is passed with good intentions and is not *mala fide*, still the provisions of the Act affect adversely people who have parted with their money for the urgent need or benefit of the debtor when the debt was borrowed or incurred. There is no presumption that every creditor is bad and every debtor a sufferer.

As this Act is "in addition to" Acts XV, XVI and XVII of 1976 and in the prior Ordinances and Acts X and XLVIII of 1975 no provision is made as to what is to happen to suits pending in civil Courts but stayed from 16th January, 1975 to 15th January, 1977. This requires clarification.

There is no provision for adding legal representatives of the creditors and debtors or to set aside *ex parte* orders or to pass *ex parte* orders. Rule 4 (4) is defective. Rule 10 should apply to the enquiry officers also. No provision is made as to the applicability of the Court-fees Act, process fees, etc.

The minimum wage is Rs. 6 per day and many rural artisans or non-agriculturist labourers may go out of the Act and lose the benefit. Even so, the exclusion of artisans in Corporations, Municipalities or Townships from the category of rural artisans is not just and proper. Explanation to section 2 (*k*) may be omitted, as the number of Corporations is 2, Municipalities about 100, and Townships under 10. There will be rural artisans living outside the excluded area and working in the excluded area.

Section 4 (*c*) says civil suits shall abate. Who has jurisdiction in respect of pending suits stayed from 16th January, 1975 till 15th January, 1977 under Ordinances 1 and 8 of 1975, Acts X and XLVIII of 1975 and Ordinance 1 and 2 of 1976, 7 and 8 of 1976 and Acts XV and XVI of 1976? Are Tahsildars to decide and report to Courts?

The jurisdiction under sections 5 to 7 should be given to the ordinary civil Courts and under section 8 to the appellate authority over them under the Civil Procedure Code and legal practitioners should be permitted to appear and represent. A time limit of 3 months can be fixed to dispose of such cases quickly. The moratorium Acts have created unemployment among lawyers from 16th January, 1975 and this Act wants further to prevent them from appearing. The appearance of lawyers dispenses with appearance of parties for every formal hearing and saves expenditure to them. This is not realised by the powers. An authorised representative is not honorary either.

The prosecution should be initiated by the enquiry judge or the appellate judge similar to section 340, Criminal Procedure Code, if it is expedient in the interest of justice and not in every case. In criminal Courts, legal practitioners cannot be prevented from appearing. The State wants to provide for free legal aid. The remedy should not be worse than the disease. The non-appearance of lawyers and criminal proceedings will be more oppressive and costly.

A.I.R. BROADCAST TALK ON JUDICIAL REVIEW IN INDIA*

By

C. R. PATTABHI RAMAN, *Barrister-at-law.*

(BROADCAST ON 16TH SEPTEMBER, 1976)

Judicial review by the judiciary of the legislation by the legislative bodies and of administrative action taken thereunder has taken different shapes in different countries. In England, where the law enacted by the Parliament is supreme, the judiciary evolved a certain form of interpretation of the enacted law. Whenever judiciary defined the scope of law, it restricted or enlarged the same in judgments delivered by them. They had to define where individual freedom ended and where State's powers began. As pointed out by a jurist, "the judges have to be informed by tradition, methodised by analogy, disciplined by system and subordinated by the primordial necessity of order, in social life."

In America, where the Constitution was framed soon after the French Revolution, two centuries ago, they were guided by the doctrine of separation of powers, envisaging checks and balances. They elaborately defined the scope and powers of the legislatures, executive and the judiciary and gave themselves a Presidential form of Government. Each Department of State was supposed to be separate. Though, in many cases, the Judiciary in America helped in the formation of a strong and a united nation, it is also true that quite often, it struck down laws which, *inter alia,* had a social content. When the late President Roosevelt wanted to put through the "New Deal" and also wanted to ease the rigours of racial laws, he thought of the process of packing Supreme Court with judges having a liberal outlook and ideas. At the outset, it must be remembered that India is a Union of States and not a federation as such. As in Canada, so in India, the residuary power of the Union Government overrides that of the State Legislatures. In items which are in the Concurrent List of our Constitution, the law of the Union prevails over the law enacted by the State Legislatures.

The Founding Fathers of our Constitution under the leadership of Pandit Jawaharlal Nehru, gave the citizens of India various fundamental rights which were protected from invasion by the Union and State Government laws. The fundamental rights were qualified in each case to preserve the integrity and security of the nation and the common welfare of the people. In Chapter IV accompanying the Fundamental Rights Chapter, the Constitution laid down Directive Principles which were declared to be as important as Fundamental Rights. Though they were not enforceable in Courts of Law, they were the guidelines for the Governance of the country. They enshrined the ideals of the Mahatma, the Father of the Nation, and of the great leaders during the struggle for freedom.

With one of the largest populations in the world and with nearly 50 per cent of the people not having enough to sustain themselves and keep body and soul together, the elected representatives in Parliament and in States enacted laws to ensure not only political equality but also social and economic equality for the citizens of India. Starting with the abolition of Zamindaris and inams and ending with the abolition of the privileges of the Princes, many laws were passed which did away with the differences between citizen and citizen. An earnest endeavour was made to provide equal opportunities for one and all. However, in spite of their best intentions, we find that, after 25 years of Independence, the rich

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have become richer in India and the poor have become poorer.

Sir Ivor Jennings, who was my professor in the London School of Economics was prophetic when he delivered a series of lectures on the Indian Constitution in Mylapore, Madras, three decades ago. He described it as a "lawyers' paradise" and warned that some of the built in provisions would involve frequent recourse to Courts, for interpretation.

Mr. Justice M. Patanjali Sastri, who later on became the Chief Justice of India, is responsible for a classic statement wherein he pointed out that judges were after all human beings and that what they wrote was influenced by their early upbringing and thinking. I had the good fortune to appear before him in the "Crossroads case" in 1951 where an enactment of Madras Government was struck down. It was in V.G. Rao's case, wherein also I took part, that he took pains to point out that the judges do not wish to attack the legislatures in a quixotic manner.

In the United Kingdom, the judges were particular not to prejudice the status of their office. Lord Devlin, in a judgment took care to point out that "The efficacy of judicial process requires that judgments should be immune from the sort of comment that it is appropriate to hustings". Lord Parker, Chief Justice, was firmer: "In modern Britain where no agreement exists on ends of society and the means of achieving those ends, it would be disastrous if Courts did not eschew the temptation to pass judgments on issues of policy. judicial self preservation may alone dictate restraint".

A distinction between the questions of law and the questions of fact is emerging in the field of judicial review. We in India are a mature people given to following the golden middle path and endeavouring to avoid extremes in political and philosophical thinking. However, recent trends in our Supreme Court created much tension all over India. From the famous "Golaknath case" downwards, the Supreme Court pronounced that there were certain "basic rights" not enumerated in the Constitution which were fundamental and that any legislation ignoring them would be bad. Their judgments were all-embracing and included constitutional Amendments under Article 368 and in effect created a deadlock.

What must never be forgotten is the fact that elected representatives of the people of India, under adult franchise, take decisions which they think is necessary for the advancement of India and *inter alia* for ameliorating the conditions of the poor and weaker sections of the community. If these measures touch upon Fundamental Rights and certain other provisions of the Constitution, definite provision has been laid down for such constitutional amendments to have the force of law. They must be passed by two-thirds of the members present in the house and approved by a majority of the States. No where in the world in any Constitution is there a provision that constitutional amendments so passed can be struck down by Courts on principles of what is now referred to as "basic rights", etc. In this connection it is well to remember that Mr. Justice M. Hidayatullah, sometime Chief Justice of India, had once stated that the Article relating to property should never have been inserted in the chapter on Fundamental Rights.

A committee under the chairmanship of a senior Member of Parliament and a statesman, Sardar Swaran Singh, has recommended comprehensive changes in the Constitution to ensure that the will of the people prevailed over the unquestioned power of judicial review.

As assured by our great leader and Prime Minister, the Swaran Singh Committee's

report is open for debate and discussion and I have no doubt that the views of many lawyers and political scientists will be listened to with respect. It is worthwhile remembering what was stated by Mr. Swaran Singh a few days back in Madras. He referred to a case where an officer found guilty of improper conduct was compulsorily retired after a proper enquiry. He moved a Court and got a single judge to give him stay. By the time the case was taken up and dealt with, some five years hence, he not only earned his pay but also his full pension. There is also the well-known example of the election petition filed by a defeated candidate against Smt. Suchetha Kripalani. On account of the procedural obstacles, the petition was disposed of after her five year term and after she was elected again.

It is true that the role of the judiciary is as important as it is delicate. The judges in India have an important position assigned to them. Their tenure of office is protected and many steps have been taken to ensure that they occupy an honourable and comfortable place in public life. As pointed out by me earlier, conditions in India differ from those elsewhere. We have therefore to preserve democratic government and at the same time ensure that the poorest and the weakest sections of the community do not feel left out in the scheme of things in India.

It is my hope and prayer that lawyers will in future play an important part in public life as they did during the days of the freedom struggle. The giants of those days were not mere technocrats striving to earn money at the bar but were also pillars of society helping the various sections of society in various ways. It is because lawyers strayed away from these ideals that we are now facing a great crisis in our lives. Members of the legal profession and the judiciary can ill afford to sit in ivory towers. They must strive to become part of the stream of life and play a useful role in the betterment of the nation.

BOOK REVIEW

CRIMINAL LAW—CASES AND MATERIALS by *K.D. Gaur*, 1975. (Publishers: N.M. Tripathi P. Ltd., Bombay-2). Price Rs. 50.

Criminal law is primarily concerned with social protection, prescribes rules of behaviour to be observed by all persons, and punishes those that transgress. *Mens rea* in the form of intent, knowledge and degrees of negligence is made an ingredient of an offence, but where social necessity demands in the interests of public welfare or because of difficulty of proof, law either dispenses with or shifts the burden of proof concerning *mens rea*. In the teaching of criminal law two different techniques are adopted. One is the traditional lecture method; the other is the relatively modern case method. Conditions in this country are such as not to permit jettisoning of the lecture method altogether nor are they conducive to its substitution by the case method. The advantages of the latter method in stimulating students to think and do their own work cannot at the same time be overlooked. The author is of the view that a combination of both methods may be the most appropriate method for study of law in this country. The instant book has accordingly arranged the subject-matter of criminal law topicwise including suitable leading cases under each head to encourage the student to teach himself, to stimulate his critical power and help him to examine legal provisions in their correct perspective.

The book consists of two parts. The first is devoted to the exposition of the principles of criminal law and the second to an examination of the extent and scope of specific crimes. Opinions may differ regarding the selection of leading cases but it cannot be gainsaid that the author's selection has not been guided by the importance of the subject-matter. The addition of model questions at the end of each chapter would conduce to the student thinking on proper lines and guide him in the proper direction. A question like the one at page 51: "What is the reason for treating the respective accused persons differently in the two cases (*Prince's case* and *Tolson's case*), cannot but grip the student and make him scan and analyse the facts and the subtle nuances of the doctrine of *mens rea* and enable him to realise that legislative intent cannot be decided on simple prohibitory words alone without reference to other considerations.

The subject has been dealt with by the author competently and in depth. The book will make profitable reading for lawyers, law-teachers and law-students.

THE CODE OF CRIMINAL PROCEDURE, 1973 (II OF 1974), by *M/s. D. Surya Rao, S.N. Bagga* and *Jagdish Lal*, 1974. (Publishers: Law Book Co., Allahabad-1). Price Rs. 20.

The book under notice provides the text of the Criminal Procedure Code, 1973, with appropriate comments based on the proceedings in Parliament relating to the Act. A comparative chart of the sections of the present Code with those of the repealed Code of 1898 and *vice versa* is given. No case-law has been cited. The book will be of assistance to lawyers and law-students.

MITTER'S POLICE DIARIES, STATEMENTS, REPORTS. Seventh Edition in two Volumes, revised by *Dr. Malik* (retired Chief Justice, Allahabad High Court), 1976. Volume I (Publishers: Law Publishers, Allahabd-1). Price Rs. 40 Volume I and Rs. 50 Volume II.

The powers and duties of the police in investigation and prevention of crime and the judicial process leading to the discharge, conviction or acquittal of the accused are matters of far-reaching importance. Investigation is the collection of evidence by the police officer. On such evidence stands or falls the case put up by the police. Police investigation is the foundation on which the whole criminal trial rests. Efficient investigation is verily the sheet-anchor of success of a criminal prosecution. Mastery of the correct principles that should guide and govern such investigation is, therefore, absolutely necessary.

The book under notice, Volume I, contains 13 chapters. Chapter I deals with Crime and its investigation; Chapter II with Powers of the police to investigate; Chapter III with First Information Report; Chapter IV with Information in Non-cognizable cases; Chapter V with Investigation in cognizable cases; Chaper VI covers Procedure when cognizable offence is suspected; Chapter VII is devoted to Investigation; Chapter VIII to Examination of witnesses; Chapter IX to Interrogation of witnesses; Chapter X furnishes Hints for Police Officer for evaluation of evidence in course of investigation; Chapter XI deals with the use of statements before Police; Chapter XII with Case Diaries and Chapter XIII with Search and Seizure. The book also sets out relevant sections of the Maintenance of Internal Security Act and the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, with case-law.

The book has gone through seven editions since its first publication in 1952. The present edition, gives a fine exposition of the law on the subject as it exists under the new Criminal Procedure Code. Case-law up to the date of publication has been taken into account. The book is a dependable guide on the subject and is a work of merit. The police, the magistrates and the criminal lawyers will find the book useful and helpful.

PRINCIPLES OF STATUTORY INTERPRETATION by *Guru Prasanna Singh* (Judge, Madhya Pradesh High Court). Second Edition, 1975. Published by Bharat Law House, Allahabad-1. Price Rs. 45.

The book has been written with the commendable objective, that it should serve as a handy book for day to day use. The problem of interpretation is the problem of the meaning of words resulting from equivocation and ambiguity of words often employed to communicate a particular thought. Whether the words used in a statutory provision are plain and whether their meaning is equally plain have themselves proved to be often questions on which Judges have differed. The Supreme Court said in one case, (1976) 2 S.C.J. at page 140, "Each statute has a personality and a message. Judicial interpretation is not bloodless and sterile exercise in spinning subtle webs, sometimes cobwebs, out of words and phrases otherwise simple, but to unfold the scheme of the legislation insightfully, sense its social setting and read the plain intendment". To ascertain such intendment certain principles of interpretation have crystallised over a long period of time and are discernible from judicial pronouncements. Viscount Simon L.C. in (1940) 3 All E.R. 549 (H.L.) at page 553 remarked that "the golden rule is that the words of a statute must *prima facie* be given their ordinary meaning". The Supreme Court observed *apropos* of golden rules,—See (1976) 2 S.C.J. 525 at 529—"There are many canons of statutory construction, but the golden rule is that there are no golden rules. Rules of interpretation are not rules of law. They are intended only to serve as guides and those that no longer serve any useful purpose may be jettisoned." (See A.I.R. 1967 S.C. 997 at pages 1003 and 1007).

The instant book contains 12 chapters. Chapter 1 sets out the Basic Principles; Chapter 2 gives the Guiding Rules; Chapter 3 deals with Internal Aids to Construction; and Chapter 4 with External Aids to Construction; Chapter 5 concerns itself with Subsidiary Rules; Chapter 6 considers Operation of Statutes and Chapter 7 the Expiry and Repeal of Statutes; Chapter 8 deals with Statutes affecting the Crown or the State; Chapter 9 with Statutes affecting Jurisdiction of Courts; Chapter 10 with Construction of Taxing Statutes and Evasion of Statutes; and Chapter 11 with Remedial and Penal Statutes. The last chapter, Chapter 12, covers Delegated Legislation. An Appendix contains the text of the General Clauses Act, 1897, with notes.

In the instant book, the author has surveyed the field completely and elucidated all the leading principles with the touch of a master taking note of the entire gamut of decisions, English and Indian. The author recognises frankly "that the duty of Judges is to expound and not to legislate is a fundamental rule, but this is now

and has ever been merely an 'aspiration'' (page 7). The book is a "must" for every lawyer.

PRACTICAL HINTS ON CROSS EXAMINATION by *Dr. B. Malik* (retired Chief Justice, Allahabad High Court) 1975. Published by Delhi Law House, Delhi-110 006. Price Rs. 50.

According to Wigmore cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth". It forms perhaps the most difficult branch of an advocate's duties. Cross-examination is a double-edged sword. Performed imaginatively and with skill it may win doubtful cases; if done injudiciously or in a slipshod manner it will only help to strengthen the opponent's case. Cross-examination is an art. Not mere mastery of maxims, but, much more, experience it is that counts. As has been stated (page 281): "Maxims of every kind should be to us as guides,—to shorten as has been well observed, the turnings and windings of experience,—nor as stern masters to stifle the inspiration of genius; and the greatest advocate is he who, perfectly conversant with the established rules of his art, knows when to break them alike with safety and advantage". Observing how cross-examination is conducted by eminent lawyers who have acquired mastery in that art is itself an education and will enable a youthful advocate to sense the moment when to break the copy book maxims with safety.

The book under notice runs to 45 chapters. It has brought together a wealth of materials to illustrate the practical hints on cross-examination given by the author. In Chapter XIX one thousand four hundred and fifty model questions, suitable to different types of cases and varying situations have been provided. The relevant provisions of the Evidence Act have been noticed at the appropriate places. The author has discussed the 'Dont's in cross-examination in Chapter XVII which are in every way as important as the other hints relating to effective cross-examination. The exposition covers cross-examination in different types of cases, of different types of witnesses including experts, and for a multitude of purposes. The approach throughout is eminently practical. The readers' attention is fully held. The book is bound to be of great help to Judges, members of the Bar and police officials.

LAW OF AGENCY by *K. Venkoba Rao*, 1974. Published by Law Book Co., Allahabad-1. Price Rs. 60.

Agency is born out of practical considerations and at times out of necessity. It is founded on the principle *Qui facit per alium facit per se*—that what a person does by another does it himelf. Shortly expressed, a person can do by an agent all that a person wants to do or is compelled to do excepting those that can be performed only personally. An agent is in sooth a conduit pipe connecting two persons. The law of agency in India has its base in Chapter X of the Contract Act and follows mainly the English law on the subject. According to the American Restatement, all agents are either servants or independent contractors. The books of Bowstead and Story respectively have become classics on the subject of agency. It is a pity that there has been no significant attempt to assess the contribution of the indigenous laws like the ancient Hindu law to the concept of agency, its frontiers and implications.

In the book under notice, the law relating to agency has been set out in 25 chapters. The author has made profuse references to standard text books and the views of great jurists in expounding the subject. He has not hesitated to state his own conclusions wherever there were different views held on any question. The Introduction gives a meticulous analysis of the different aspects of problems relating to agency. The author's remark (page 44): "it is regrettable that it is little appreciated that legal planning is as necessary to a developing country as economic planning", "good laws can be a panacea for the nation's economic ills as also redress for private injuries", and "a Planning Commission without a law member will be merely enacting Hamlet without the Prince of Denmark" are quite just, apposite and appropriate.

The statement on the same page that the Indian Contract Act will be celebrating its centenary in 1972 has to be recast in view of the fact that that year had already passed away even when the instant book was published in 1974. The author's classification and analysis of agents of different kinds is perhaps the most exhaustive on the matter. English and American law as well as leading decisions have been fully considered. It would have enhanced the value of the work if the author had set out his suggestions as to amendments of the existing law if Indian commerce is to prosper. The author is to be congratulated on providing a commentary which is at once complete, useful and workmanlike. The book will serve well the legal as well as the mercantile community.

ADVOCATES ACT AND PROFESSIONAL ETHICS by *Nirmalendu Dutt Majumdar.* Second Edition, 1975. Published by Eastern Law House P. Ltd., Calcutta-700013. Price Rs. 28: £ 3: $.7.50.

The legal profession is regarded as an exalted one. Practice of law is not a trade or business. It is a personal right or privilege, circumscribed by duties all round. In fact the privilege of the advocate is his duty and his duty is his privilege. The advocate's duties fall under four types: (*i*) his duty to his client; (*ii*) his duty to his opponent; (*iii*) his duty to his colleagues; and (*iv*) his duty to the Court. Over the years norms have evolved regarding standards of professional conduct and ethics. In India, the Bar was integrated into a single class by the Advocates Act of 1961. The Act has undergone comprehensive amendments in 1973 and 1976. The instant book provides comments on the provisions of the Act as they stood till recently A short history of the legal profession, a chapter on standards of professional conduct and etiquette, the Canons of Ethics of the American Bar Association Conduct and Etiquette at the Bar of England and Wales, and the Bar Council of India Rules are also given. The author's plea to amend section 9 to avoid the anomaly of the possibility of the elected members of the Disciplinary Committee having a standing of less than a year at the Bar while the member co-opted thereto should have not less than ten years' standing is just. The decision of the Supreme Court in *Bar Council of Maharashtra* v. *Dabholkar*, A.I.R. 1975 S.C. 2092, holding that the State Bar Council is a "person aggrieved" within the meaning of section 37 so as to enable it to maintain an appeal under section 35 and examining the scope of the advocate's status and duties was presumably not available at the time of the book going to the press. The book will be of much interest to members of the Bench and the Bar alike.

HINDU MINORITY AND GUARDIANSHIP ACT, 1956 by *C.U. Menon.* Third Edition, 1973. Published by Law Book Co., Allahabad-1. Price Rs. 25.

Minors have been an object of solicitude at law. Their welfare has been the yard-stick applied in deciding questions relating to guardianship. The law relating to Hindu minors was largely a matter resting on a few Smriti texts. The Hindu Minority and Guardianship Act, 1956, has amended and codified certain parts of the law on the subject. It is further to be noted that the Act is intended to be supplemental to the Guardians and Wards Act, 1890. The chief features of the 1956 Act are the securing to a mother a position of respectability, conferring on her the power to appoint testamentary guardians to her minor children, prohibiting *de facto* guardians from alienating minor's property and making Court's previous sanction necessary to any alienation of the immovable property of a minor.

The book under notice is a mosaic of cases and principles. It provides comments on the sections. There seems to be little point in the comment at page 150 that "after the present Act, the onus on the purchaser to inquire into the transferor's right is very heavy and he would not be deemed to have entered into the transaction in good faith if he fails to inquire into the authority of the vendor", inasmuch as it is now recognised that a *de facto* guardian's transfer is void, in which case the question of good faith does not enter. The book has, in the Appendices given the Guardians and Wards

Act, the Indian Majority Act, the Hindu Adoptions and Maintenance Act, Children Act, and extracts from the Civil Procedure Code and the Indian Succession Act, making the book more or less a self-contained manual on the subject. The book will be of assistance to the members of the legal profession.

HINDU ADOPTIONS AND MAINTENANCE ACT (LXXVIII OF 1956) by *T.P. Gopalakrishnan.* Third Edition by *J.P. Shingal.* 1969 edition with 1972 Supplement. Publishers : Law Book Co., Allahabad-1. Price Rs. 20.

Adoption among Hindus is no longer to be understood in the old sense or as being for the old object. It is in law today a secular institution stripped of its religious base and its religious moorings. The right to adopt is equally available to a male or a female. A boy or a girl may be taken in adoption.

The book under notice is a commentary on the provisions of the 1956 Act. An appendix sets out the Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956 ; Extracts from the B.N. Rao Committee's Report ; Extracts from the Draft Bill prepared by the Hindu Law Committee, 1947; Nature of Adoption and its place in the Hindu System; and Extracts from Tagore Law Lecture on Adoption. Now that two decades have passed since the passing of the Act, the giving of the old law of adoption even in the appendix is of doubtful utility. The statements at page 67 regarding the effect of adoption by a widow : "she can adopt to herself in her own right though the adoption enures for both the spouses" and later "the child adopted by a widow is deemed to be the child of the female adopter herself" require clarification. Likewise the view that the doctrine of 'relation back', is not in operation may require modification in the light of *Sitabai's case,* A.I.R. 1970 S.C. 343. At page 73, para. 3, it is stated that under section 8, any female Hindu, if married, can adopt; she can also adopt, if her marriage has been dissolved, etc. The words "if married" should perhaps be "if not married". *En passant* it may be noted that the maintenance provision in section 488 of the Criminal Procedure Code of 1898 has been superseded by sections 125 to 128 of the present Code of Criminal Procedure (II of 1974) introducing some radical changes. The comments under the section are made in simple and lucid language under appropriate headings in a manner which will enable even laymen to understand the law.

SECTION 80, CIVIL PROCEDURE CODE AS AMENDED BY CODE OF CIVIL PROCEDURE (AMENDMENT) ACT 104 OF 1976.

By

T. R. VENKATARAMANAN, B.COM., B.L., D.P.P.A., *Advocate, Tenkasi.*

In all legal battles where Government is a party, it is better armed (*i.e.*) with section 80, Civil Procedure Code. Section 80 as it was, was held to be 'express, explicit, mandatory and did not admit of any exception,' *Bhagchand* v. *Secretary of State for India*[1]. So it had been causing a lot of hardship, in cases where one wanted urgent relief of mandatory or prohibitory injunction against the Government. Many suits were dismissed because of want of, or defect or error in the section 80 notice. Justice M. Ananthanarayanan held in *State of Madras* v. *Ramalinga Reddiar*[2], that once the section 80 notice is served on the Government, it should stay its hand in all fairness and it was a fair and workable rule.

Clause 28, Bill 27 of 1974 which was presented in Parliament on the 8th day of April, 1974 proposed to remove section 80 altogether from the body of the Code of Civil Procedure. The Statement of Objects and Reasons stated: "Section 80 which provides for compulsory notice before instituting a suit against the Government or a Public Officer is being omitted because, it is felt that the State or the Public Officer *should not have a privilege* in the matter of litigation, as against a citizen and should not have a higher status than an ordinary litigant in this respect"[3]. The notes on clause 28 read[4] "..In a democratic country, there should be no distinction of the kind envisaged in section 80 between the citizens and the State." However on second thoughts and for reasons best known to the Government, it has decided to retain this section. The Minister for State for Law speaking in Parliament has claimed that section 80 has helped to resolve many cases and disputes *sans* recourse to Court and enabled speedy disposal of cases. But the following extract from a judgment of V.R. Krishna Iyer, J. of the Supreme Court[5] will be of interest. It stated "that there was a public feeling that law's delays had become a besetting sin of the Indian judicial process, but the public was not sufficiently aware, that the biggest litigant in the country, the State has frequently been displaying lack of diligence in filing statements, counter-affidavits or motions for *ex parte* stay or injunction in lower Courts". The learned Judge declared 'the *State* as a party to the litigation *does not enjoy special privilege* to be indolent or negligent'. In practice section 80 is more often misused than used and did not serve the purpose.

Keeping the plight of the litigants and the consequences in view, the Government has struck a balance between the two extreme views on section 80 *i.e.*, of abolition and retention.

Section 80 (2) newly inserted in 1976 is in many ways a compromise between those who argue 'for and against' omitting section 80. An analysis of section 80 (2) gives the following points :—

1. In a suit to obtain urgent or immediate relief against Government, a suit may be instituted, with the leave of the Court, without serving the two months' notice contemplated under section 80 (1).

2. But no relief, interim or otherwise, would be granted without giving an

1. 53 M.L.J. 81 : 54 I.A. 338 : I.L.R. 51 Bom. 725 (P.C.).
2. (1967) 2 M.L.J. 131.
3. 6 (*e*) of the Statement of Objects.
4. See p. 104.

5. The Hindu, Madras, dated 13th October, 1975.

opportunity to the Government or Public Officer of being heard. That means the Court may, while issuing a notice to the Government for appearance impose an order to maintain *status quo* till the arguments are heard.

3. If the Court after hearing the Government or the Officer concerned comes to the conclusion that there is no urgency in the matter, it shall not reject the plaint for want of notice under section 80 (1), but return the same to the party for representation after complying with the requirements of section 80 (1).

4. However if the Court is satisfied with the urgency, it is always at liberty and has a duty to pass an interim order (or final one) without insisting on a section 80 (1) notice.

5. Section 80 (3)—new—states that no suit against a Government or a Public Officer shall be dismissed merely because of some error or defect in section 80 (1) notice, so long as the notice describes the plaintiff, so as to enable the appropriate authority or the Public Officer to identify the person serving the notice and the cause of action and the relief claimed by the plaintiff have been substantially indicated.

These welcome changes are going to help the public in the long run, when they will be in need of an urgent order against the Government. The Government should be congratulated for effecting these changes even though it has decided to retain section 80, for these changes in practice will really off-set the evil effects of section 80 (1). We may also hope that these amendments are the first step towards the eventual abolition of section 80 notice.

BOOK REVIEW

HANDBOOK ON A.P. LAND REFORMS (CEILINGS ON AGRICULTURAL HOLDINGS) ACT, 1973 by *P. C. Reddy.* 1975 Edition. Publishers: Prabhat Publications (Nellore 2). Price Rs. 30.

Land reforms hold a foremost place in social legislation. Transformation of an age-old economy based on agriculture into an aggressively industrial economy calls for radical revision in the systems of landholding, land utilisation etc. Land reforms are recognised to be of paramount importance for the rejuvenation of the entire social structure, particularly in regard to the weaker strata of society. Of the several measures taken since the country achieved independence to achieve the purpose, fixation of ceiling on agricultural holdings is one of great significance with far-reaching results and impacts. The Andhra Pradesh Act, I of 1973, in conformity with the all-India pattern agreed to at the Conference of Chief Ministers in 1972 has been enacted accordingly. The Constitution (Thirty-Fourth Amendment) Act, 1974 has included the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act, 1973 in the Ninth Schedule to the Constitution and has thereby rendered the Act immune from any challenge as to its constitutional validity. It may be noted in passing that the Act of 1963 has undergone some amendments by the Andhra Pradesh Act IX of 1974.

The handbook consists of four parts. Part I in two sections contains in one section the bare text of the Act and in the other section notes on the Act with relevant excerpts from the legislative proceedings. Part II refers to some important Court decisions. Part III carries Appendices A to C giving relevant portions of the concerned Acts, Rules, Orders, Notifications, etc. Part IV sets out the A.P. Land Reforms (Ceiling on Agricultural Holdings) Rules, 1974; the A.P. Ordinances Nos. 9 and 10 of 1974; and the A.P. Tenancy Act of 1974.

Though immunised from attack on its constitutional validity, the Ceilings Act of 1963 contains a number of controversial provisions affording abundant scope for a spate of litigation both in regard to their construction as well as to their validity. Material provisions like the definition of 'family unit', 'ceiling area', standard holding' etc., are likely to be taken to the Courts for elucidation. Likewise, the classification of land under section 5 as set out in the First Schedule and the provisions relating to the calculation of the amount payable under section 15 as laid down in the Second Schedule are likely to be the subject of sharp challenges. On top of all the impact of the Act on Hindu law provisions regarding divorce, adoption, etc. is also a fruitful field for litigation. The author has pinpointed attention to all these points. He has brought together a prodigious amount of material bearing on the Act. The author's analysis of the provisions of the Act is clear and his comments form a critical appraisal of the inwardness and implications of the legislation. In sum, the author may justly take pride in his work.

THE POSITION OF TENANTS OF USUFRUCTUARY MORTGAGEE UNDER THE TAMIL NADU CULTIVATING TENANTS PROTECTION ACT, 1955.

By

M.R. PRADEEP KUMAR, B.A., M.L., *Advocate, Krishnagiri.*

The Full Bench has held in *Chandrasekaran* v. *Kunju Vanniar and others*[1], that the tenants under a usufructuary mortgagee are entitled, after redemption of the usufructuary mortgage, to claim the protection granted under the Tamil Nadu Cultivating Tenants Protection Act, 1955, against the mortgagor. It has observed, that the principle that no man can confer upon another a title or right higher than what he himself possessed, will have no validity in the application of the inclusive definition of 'cultivating tenant'.

The question, whether the lessee, who obtained, the lease from a person having no title is entitled to the protection of the Act (Madras Cultivating Tenants' Protection Act, 1955) was discussed in *Ayyan* v. *Pechi and another*[2]. The suit was instituted for injunction to restrain the defendants from interfering with the possession of the plaintiff. The suit was dismissed by the trial Court on the ground, that the plaintiff had not proved her possession on the date of the suit. But on appeal, this finding was reversed by the learned subordinae Judge, as the plaintiff was found to be in possession of the suit property and was still in possession. During the pendency of the appeal, a lease was alleged to have been created by the first defendant in favour of the second defendant (appellant before the High Court). It was contended on behalf of the second defendant, that he could not be evicted by the plaintiff, as he was entitled to the protection of the Madras Cultivating Tenants' Protection Act, 1955. But his contention was negatived. The second defendant who lost his case, preferred an appeal, to the High Court. Venkataraman, J., was in complete agreement with the lower appellate Court, that the appellant was not even in possession and therefore he could not be said to be carrying on personal cultivation. A cultivating tenant means a person who carries on personal cultivation on such lands under a tenancy agreement express or implied, and no cultivating tenant shall be evicted from his holding or any part thereof, during the continuance of the Act by, or at the instance of his landlord. According to the learned Judge, the cultivating tenant is protected against eviction only by or at the instance of his landlord. This protection may avail him as against the plaintiff. Between the plaintiff and the appellant, there was no relationship of landlord and tenant. The wisdom underlying this provision can be illustrated by imagining what would happen if the contrary position contended for, by the appellant was to be accepted. If the appellant is entitled to the benefit of this immunity from eviction, it would mean that what a trespasser on the land cannot directly get against the true owner, he can secure to a sub-lessee from him, by simply pretending to let out the land to the sub-lessee. Surely the law cannot be so absurd as that.

The same question whether the lessee of a usufructuary mortgagee is entitled to the protection of the Madras Cultivating Tenants Protection Act, was discussed in *Amirthalingam Pandarathar and another* v. *Kesavachariar*[3], and in this case, reference was made to *Mangalatha-*

1. (1976) 2 M.L.J. 243 : 88 L.W. 216 : A.I.R. 1975 Mad. 227.
2. (1964) 77 L.W. 148.
3. (1971) 2 M.L.J. 415 : 85 L.W. 300 : A.I.R. 1972 Mad. 253.

chari v. *Kalyanasundara Mudaliar*[4]. In the case referred to Kailasam, J., held, that a lessee of the usufructuary mortgagee is not entitled to the protection of the Madras Cultivating Tenants Protection Act, 1955. He cannot claim the rights of a cultivating tenant as against the mortgagor subsequent to the redemption of the mortgage. It was observed further, that the lease created by the mortgagee would be binding on the mortgagor even though the mortgage has been redeemed, provided the mortgagee as a prudent owner entered into a lease agreement in the ordinary course of management. This is an exception to the rule, that the mortgagee cannot confer better title than what he has.

Kailasam, J., distinguished the Supreme Court decision in *Dahyalal* v. *H.M. Abdul Rahim*[5], and held, "The section in the Madras Cultivating Tenants' Protection Act, is differently worded. Under the Madras Act, a cultivating tenant is defined as a person carrying on personal cultivation under a tenancy agreement express, or implied, whereas under the Bombay Act, a person lawfully cultivating any land belonging to another person shall be claimed to be a tenant. Under the Madras Act, there should be a tenancy agreement, express or implied, but under the Bombay Act, it is enough, if the person lawfully cultivates any land belonging to another. Thus a tenant under the usufructuary mortgagee who has a right to be in possession would be a cultivating tenant under the Bombay Act. Cultivation by a tenant of a land in possession of the usufructuary mortgagee or lessee would satisfy the requirements of the Bombay Act, whereas it will not satisfy the definition of a cultivating tenant under the Madras Act. The Madras High Court has taken the view that the tenancy agreement must be with the landlord. A person would not normally be entitled to transfer any right, to which he is not entitled. He cannot confer the right on a tenant to be in possession for a longer period. Unless the words in the statute are clear and specific this construction will not be justified."

In *Kathaperumal* v. *Muthiah*[6] it was observed that a sub-lessee could not have any rights as against the head-lessor as there is neither privity of estate nor privity of contract between the head-lessor and the sub-lessee. Thus a sub-lessee could not come under the definition of "cultivating tenant".

In view of similar decisions (*Ramaswami Naidu* v. *Marudeveera Mooppan*;[7] *Ganapathi Iyer* v. *Ayyakannu*,[8] that a tenant is not a 'cultivating tenant', under the Act, an amendment was introduced by the Act IX of 1969, by which, a sub-tenant is entitled to claim the protection under the Act.

Anyhow, in *Amirthalingam Pandarathar and another* v. *Kesavachariar*[9], Gokulakrishnan, J., held, that as the plaintiff had in that case consented to the usufructuary mortgagee, leasing the lands to the defendant, the defendant satisfied the definition of 'cultivating tenant' under the Act. He has observed: "Since the Supreme Court decisions can be applied only on principles, I cannot override the decision in *Mangalathachari* v. *Kalyanasundara Mudaliar*[10], which is direct to the issue in question in this case. It is for a Division Bench to decide this question as and when occasion arises. For my part,

4. (1966) 79 L.W. 440.
5. (1963) 2 S.C.J. 450 : (1963) 3 S.C.R. 1 : A.I.R. 1964 S.C. 1320.
6. (1963) 1 M.L.J. 359.
7. (1959) 1 M.L.J. 25 : (1959) M.W.N. 30.
8. (1961) 1 M.L.J. 217.
9. (1971) 2 M.L.J. 415 : 85 L.W. 300 : A.I.R 1972 Mad. 253.
10. (1966) 79 L.W. 440.

I am not placing this case before my Lord, the Chief Justice, for the purpose of referring the question to a Division Bench, since I am inclined to allow the appeal on a different point."

An interesting question arose in *Pavadai Padayachi* v. *Pichammal*[11], wherein, the appellant (the civil revision petitioner) executed a usufructuary mortgage of his land in favour of another. There was a lease-back arrangement between the parties. The usufructuary mortgagee obtained decrees for arrears of rent in three different suits. The mortgagor-lessee (civil revision petitioner) claimed that he was entitled to the relief under Tamil Nadu Act XXI of 1972. The learned counsel for the respondent based his main contention on the wording "belonging to another person". A cultivating tenant means "a person, who contributes his own physical labour or that of any member of his family in the cultivation of any land belonging to another", under a tenancy agreement express or implied. According to the learned counsel for the respondent the civil revision petitioner the mortgagor-lessor would not be entitled to the benefit of the Act, as the land cultivated by him did not 'belong to another person'. He wanted to equate the term 'belonging to another person' in respect of land with ownership. This mode of argument was not accepted by N.S. Ramaswami, J., and he observed, that the respondent, in the capacity of a usufructuary mortgagee is entitled to lease the property mortgaged and under the lease-back agreement the mortgagor is bound to pay rent. There is nothing to show that the word 'belonging' is synonymous with ownership and he held, that the mortgagor is entitled to the benefit of the Act.

The conflicting question, whether the lessee of the usufructuary mortgagee is entitled to the benefit of the Tamil Nadu Cultivating Tenants' Protection Act, 1955, has come to be settled by the Full Bench decision in *Chandrasekaran* v. *Kunju Vanniar and others*[12]. It has been pointed out, that the tenant of the usufructuary mortgagee is a cultivating tenant, and hence, he is entitled to the protection of the Tamil Nadu Cultivating Tenants Protection Act, 1955, subseqent to the redemption of the mortgage. At the second appeal stage of this case, Ramanujam, J., placed reliance on the Supreme Court decision in *Prabhu* v. *Ramdeo*[13], for this view. It has been further remarked: "But we would prefer to rest our view on the construction that we have been inclined to make on the statutory provisions themselves in the Tamil Nadu Cultivating Tenants' Protection Act, 1955."

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11. (1974) 2 M.L.J. 344 : 87 L.W. 894.

12. (1975) 88 L.W. 216 : (1976) 2 M.L.J. 243 : A.I.R. 1975 Mad. 227.

13. (1966) 3 S.C.R. 676 : (1967) 1 S.C.J. 60 ; A.I.R. 1966 S.C. 1721.

MUNIYANDI v. RAJANGAM IYER, (1976) 1 M.L.J. 344: 89 L.W. 249: A.I.R. 1976 Mad. 287—requires reconsideration.

By

S. GOVINDARAJAN, B.SC., B.L., *Advocate and Government Pleader, Chidambaram.*

In *Muniyandi* v. *Rajangam Iyer*[1], the High Court has held that by virtue of section 16-A of the Tamil Nadu Agricultural Lands Record of Tenancy Rights Act (X of 1969) the jurisdiction of civil Courts is specifically excluded in respect of matters determinable by the authorities provided under the Act.

The object of the legislation itself is only preparation and maintenance of records of tenancy rights in respect of agricultural lands.

First, the Government prepare and publish a draft record of tenancy rights. Any person aggrieved by that can prefer an application for correction. Then, after enquiry, the final record is published (Section 3). There is then section 4 under which provision for application for inclusion in the record and section 5 under which provision for application for modification are provided. The enquiry is to be conducted by an official of the Revenue Department not below the rank of a Deputy Tahsildar. There is then provision for appeal to the Revenue Divisional Officer under section 6 of the Act and revision by District Collector under section 7 which is final. These officers have only limited powers of enquiry under section 10, enforcing attendance and examination of witnesses, discovery and production of documents, receiving evidence or affidavits and issuing commissions for the examination of witnesses. The other two relevant sections are section 15 whereunder the record of tenancy shall be presumed to be true and correct until the contrary is proved or a new entry is lawfully substituted therefor and S. 16-A which deals with exclusion of jurisdiction by civil Courts in respect of matters determinable by the Authorities provided under the Act.

A perusal of the various provisions of the Act, clearly indicates that a Government machinery with provision for summary enquiry, appeal and revision to the Revenue Officials alone having only limited powers circumscribed by the Act, for the preparation and maintenance of records of tenancy in respect of agricultural lands has been set up. That is all. The Act does not vest the officers with jurisdiction to decide for instance, whether the lands are agricultural lands, whether there is any relationship of landlord and tenant or rival claims to tenancy etc. There is no provision for setting aside *ex parte* orders, restoration of petitions dismissed for default, amendment of pleadings, addition of parties or addition of legal representatives. It is entirely a Government set-up and whatever orders are passed by the Revenue Officials are final and sacrosanct.

With this background, if we turn to the decision in question we find that the learned Judges have taken the view that the jurisdiction of civil Courts is completely excluded in respect of matters determinable by the Authorities under the Act. They are also of the view that section 15 of the Act is only a rule of evidence and does not touch jurisdiction.

This decision seems to run counter to the well established principles laid down by our High Court and the Supreme Court in a number of decisions. The order of the Settlement Officer granting Patta under the Estates Abolition Act has been held not to affect the question of title to

1. (1976) 1 M.L.J. 344 : 89 L.W. 249 : A.I.R. 1976 Mad. 287.

the property and it has also been held that the officer has no jurisdiction to decide rival claims. See *Rajasekaran* v. *Elumalai*[2]; *State of Madras* v. *Ramalingaswamigal Madam*[3]; *State of Madras* v. *Balamanavalr Reddiar*[4]; *T. M. Lakshminarayana Iyer* v. *Nallachi Ammal*[5]. On the question of exclusion of jurisdiction of civil Courts, we have the land mark case of the Supreme Court reported in *Dhulabhai* v. *State of M. P.*[6] wherein the Supreme Court has discussed the entire case law on the point and has laid down :

"When the statute gives a finality to the orders of the Special Tribunals, the civil Court's jurisdiction must be held to be excluded if *there is adequate remedy to do what the civil Courts would normally do in a suit*. Such provision however does not exclude those cases *when the provisions of the Act have not been complied with* or the *statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.*

When there is an express bar of jurisdiction of the Court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil Court.

An exclusion of the jurisdiction of civil Courts is not readily to be inferred".

Applying these principles, it will be clear that in the Tamil Nadu Act X of 1969, there is no complete ouster of jurisdiction of civil Courts, the Act itself being only for preparation and maintenance of record of tenancies and there being no provision at all for determination of tenancy, rival claims of tenancy etc.

For example, if a person gets his name registered behind the back of an absentee landlord, that landlord, is doomed for-ever if the principle laid down in *Muniyandi's case*[7], is applied. Neither section 4 which applies to cases of inclusion nor section 5 which applies to modification on the basis of subsequent events, will help him. Similarly if two persons get their names separately registered as tenants for the same land, who is to determine their rival claims?

The clue is found in section 15 itself as rightly pointed out by Justice N.S. Ramaswamy. Section 15 enacts a rebuttable presumption. According to the decision in *Muniyandi's case*[7], this enacts only a rule of evidence and does not touch jurisdiction. But that view is not correct. Who is to decide the issue relating to this rebuttable presumption? There is no provision in the Act for that. Only the civil Court can decide the question whether the presumption of correctness of the entry has been rebutted or not.

In all other tenancy legislations, the civil Courts have appellate or revisional jurisdiction. In fact, under the Act, a "tenant" has been defined to be one as defined under the Madras Cultivating Tenants Protection Act, XXV of 1955 and that Act is subject to the revisional jurisdiction of the High Court. There is therefore no reason, nor justification to exclude the jurisdiction of civil Courts with regard to this Act.

For the foregoing reasons, the decision reported in *Muniyandi's case*[7], requires reconsideration.

[END OF VOLUME (1976) 2 M.L.J. JOURNAL]

2. (1976) 1 M.L.J. 288 : 89 L.W. 158.
3. (1969) 2 M.L.J. 281.
4. (1972) 85 L.W. 141 : A.I.R. 1973 Mad. 14.
5. (1974) 87 L.W. 276.
6. (1969) 1 S.C.J. 925 : (1968) 3 S.C.R. 662 : A.I.R. 1969 S.C. 78.
7. (1976) 1 M.L.J. 344 : 89 L.W. 249 : A.I.R. 1976 Mad. 2 7.